Prof. Roscoe Pound
with my cordial compliments
Fred Rush
Dec. 25 19

SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA
Los Angeles

GIFT OF

Roscoe Pound

A MANUAL

—OF—

EQUITY PLEADING AND PRACTICE

STATE AND FEDERAL

WITH ILLUSTRATIVE FORMS, AND INCLUDING THE FEDERAL EQUITY RULES OF COURT. SPECIAL ATTENTION GIVEN TO MODERN PRACTICE IN RELATION TO THE MASTER'S OFFICE.

—BY—

GEORGE FREDERICK RUSH, A. M.

OF THE CHICAGO BAR

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PREFACE.

These few pages grew out of a course of lectures delivered for several years at The John Marshall Law School at Chicago. A limited time spent studying one hundred pages of essentials, yields better results than the same time spent on one thousand pages, through which are scattered the same essentials, with nine hundred pages of minor details. For mental grasp, students and lawyers prefer the small elementary treatise; for later study and reference, the larger one. No small work has been published during the last twenty years, and the practice has modernized in many respects. It therefore seems a fit time to produce this modest book, which it is hoped, may lighten the labors of students and lawyers.

Its plan is different from prior small treatises. Its aim is to treat the main features briefly but not less completely than in other works large or small, and to discuss only such matters of procedure as most frequently arise, and need to be better understood. The book is designed for the studious lawyer as well as for the student. It is intended to set forth the general chancery procedure, State and Federal. Illinois cases have been cited, where possible, merely to make the book more useful for some particular State. Modern practice in relation to the master's office has received special attention.

The practice in the federal courts is largely controlled by the United States Supreme Court's equity rules, and they are included for ready reference.

State statutes, governing chancery practice, usually provide that matters of practice not therein provided for, shall be "according to the general usage and practice of courts of equity." The equity rules of the Federal Supreme Court, in whole or in part, have been adopted by many of the states, and thus, in substance, have found their way into many decisions, State and

Federal, largely influencing the usage and practice of equity courts in this country. Equity rule 90 of the Supreme Court provides, that in cases not covered the then (1842) practice of the High Court of Chancery in England, may furnish a guide so far as may be consistent with local circumstances and conveniences. Therefore, when a question of practice is not settled by the usage and practice of the state, or of the United States it becomes important to consult the English edition, 1837, of Daniels' or Smith's Chancery Practice, which, together with the general orders made by Lords Cottenham and Langdale (many of which were closely copied in the U. S. Equity Rules), are the best authorities on English practice at the time the United States rules were adopted. (Thomson v. Wooster, 114 U. S. 104, 112; Evory v. Candee, 17 Blatchf. 200). Barber's Work, "Chancery Practice," seems to be based on the old New York Chancery Rules and Daniel's Work, and thus sets forth more especially the New York State practice.

The writer desires to express his thanks to his friends Walter S. Holden and Edward T. Lee for their valuable suggestions and help.

George Frederick Rush.

Chicago,
April 1, 1909.

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A MANUAL

—OF—

EQUITY PLEADING AND PRACTICE

INTRODUCTION.

The principles, forms and precedents of the ancient common-law courts became so fixed and narrow and were so strictly adhered to by the common law judges, that frauds and wrongs, disguised and protected under the forms and precedents of the common law, could not be adequately remedied. The common law judges had fallen into the error of following the strict letter instead of scrutinizing the reasoning of prior decisions. The King therefore, established himself as a court of extraordinary powers. It became known as a court of "the King's Conscience," a "Court of Equity," which concerned itself more about substance or reason than form, more about the true intent and effect of acts than about the form of acts, however disguised as lawful. This court, while respecting the forms and precedents of the common law, did not feel bound by them to the extent of withholding the justice demanded by the peculiar facts of a case.

In time this new court, by its body of decisions, developed its own principles or maxims, its own precedents, and its own rules, and we have "reports" of Equity cases, as we have "reports" of law cases. These precedents, in a measure, have also become more or less fixed; but the historical purpose of this court will prevent it from falling into the ancient rigidity of the common law. Certainty, stability and consistency in decisions, are necessary to any good system of law. It is the essence of English and American law that a decision whether at common law or in equity, based upon just and sufficient reasons or grounds,

stand as law, except as it must be enlarged or be modified to suit controlling and more just reasons (Blackstone 70). That is what is meant by the doctrine of "*stare decisis;*" that is what is meant by "case law;" that is what is meant by "the common law," and "equity law." If a former decision is manifestly unjust, it is not law (Blackstone 70). Common and Equity law are "Judge-made laws," a phrase much misunderstood. The phrase "common law" is often used to denote non-statute law and thus includes equity law (1 Kent 492). Broadening and changing with reason, is the virtue and excellence of the common law and equity law, as contrasted with domestic statute law or with foreign statutory codes.

Statutes can be changed only by legislative re-enactment, and suitors are not permitted to appear there for relief.

Administrative statutes, setting up and regulating, not rights themselves, but the various governmental agencies and procedures for the protection of rights, are necessary to conserve rights, and are proper subjects for the legislature. But statutes cannot, so well as courts, go beyond this field and attempt to define the infinite principles of human justice. Rights depend upon the unforseeable combination of facts in each case. Pronouncing what is right or wrong under the peculiar facts of a case, is best done by courts, the governmental agency established for the purpose. (Blackstone 61). If the legislature could foresee every combination of facts that may occur, have them elucidated by opposing parties, and have them pronounced upon by impartial experts, then these pronouncements, embodied in statutes, would be something like the law formulated by equity and common law judges; and they would be about as voluminous. The forum for administrative law is properly the legislature; the forum for the law of rights, justice, is properly the court, the only place where, in the course of time, every conceivable right is earnestly asserted, fully defended, strongly attacked, fully discussed and impartially decided.

The inherent rights of man arise out of his nature,

and thus are not artificial, verbal ideas, but facts determined by nature itself. These "inalienable" nature-given rights exist independently of any expression or pronouncement by ruler, man, judge or legislature, (Blackstone 54), and it is "to secure" them and "the blessings of liberty" that governments and statutes are established (Declaration of Independence; Constitutions of the United States and of the various States). Such rights are broadly recognized and confessed in the preambles, or bills of rights (Bailey v. People, 190 Ill. 28), or other clauses, of state and national constitutions.

For man's intellectual use and guidance, however, it is necessary that some authoritative agency, like the courts, through their decisions, formulate rights in language as accurately as possible from time to time, according to the light of reason, which means according to just and true grounds, so far as the race is able to perceive them. These decisions are law if the reasoning is sound. Thus, in American and English law, unlike the foreign Napoleonic statutory code law, the basic rights of man, "among which are life, liberty, and the pursuit of happiness," phrases which include numberless rights, are not intended to be created or limited by statutory words, but are discoverable by sound reason alone; and justice is "established" not upon the words of this or that legislature, or king, or mob, not even upon unreasonable or degraded custom, but upon sound reason alone. "Reason is the highest law," said Cicero. "What is not reason is not law," says Blackstone. "He knows not the law who knows not the reason thereof," says Coke. "Her seat is the bosom of God," says Hooker. It is because our system of law rests upon such foundations that the American or English lawyer becomes a zealous student, an enthusiastic devotee of the law.

The ancient common law judges exaggerated the importance and sufficiency of their own pronouncements, and narrowed the meaning of *stare decisis*. Had they been expounders rather than dogmatizers, there would have been no need for the invention of Equity.

Equity courts rescued English law from the slavery to the letter of precedents, into which the common law had fallen; and now together they constitute one system, each court merely handling a distinct class of cases, (1 Story, sec. 25), and both conservedly but steadily reforming and enriching the expression or letter of the law, thus guiding its stately progress towards the "perfection of reason."

The ancient office from which chancery writs were issued and to which they were returned was known as the "*officina justitiae,*" or "the office of justice." It was also sometimes called "the court of chancery." The officer authorized to issue the writs finally became the presiding officer of the court, and was called the Chancellor, and later he was known as the Lord Chancellor, and the court grew to be the highest court next to Parliament. The Chancellor was also called "the Keeper of the Great Seal" and "the Keeper of the King's Conscience."

From the earliest times the Court of Equity exercised extraordinary powers, and conflicts arose between its jurisdiction and that of the common-law courts as early as the fourteenth century. In 1616 Sir Edward Coke, Chief Justice of the King's Bench raised a great contention against the power of Courts of Equity to grant relief after a judgment at law or against a judgment at law. The King, James I, sustained his Chancellor, Lord Elsmere, in this controversy. In later centuries it came to be settled and accepted that Equity Courts could have no jurisdiction where there was an adequate remedy at law. It was established that it did have jurisdiction where courts of law could not give a definite, adequate and complete remedy. If such a case is not shown by the bill of complaint, even if no objection is made by demurrer, plea, answer or by suggestion of counsel, it is the duty of the court to recognize the objection (Hill v. Babin, 19 How. 278.) Parties may not even by consent confer jurisdiction upon a court of equity which properly belongs to the

common law court. (Toledo R. Co. v. St. Louis R. Co., 208 Ill. 623).

If the court of equity has jurisdiction over the subject-matter and can grant the relief sought, the objection to the jurisdiction on the ground that there is an adequate remedy at law should be taken promptly and before entering upon a defense to the merits (Kilbourn v. Sunderland, 130 U. S. 505; Brown v. Lake Superior Iron Co., 134 U. S. 530). In Illinois such objection must be raised by demurrer, plea or answer or it will be waived (Kaufman v. Wiener, 169 Ill. 596).

If the case contains some one or more of the recognized grounds of jurisdiction in equity, the remedy at law, if one exists, to exclude jurisdiction in equity, must be as practical, as complete, as prompt, and as efficient, not only with respect to the immediate action, but in obviating the need of further litigation concerning the subject-matter of the controversy, and in preventing irreparable or continued injury and damage. (Boyce's Executors v. Grundy, 3 Peters, 210; Ins. Co. v. Bailey, 3 Peters, 210; Kilbourn v. Sunderland, 130 U. S. 505).

In Illinois, if a party commencing any civil suit or proceeding has misconceived his remedy, he may be permitted, in the discretion of the court, and on payment of all accrued costs and such clerk's advance fees as are required for the commencement of the suit in the proper form, by proper amendments, in the same proceeding, to transfer the suit, if at law, to chancery, and if in chancery, to the law docket of the court; and when so transferred, the suit shall proceed as though originally commenced on such side of the court (Sec. 40 Ill. Stat. Practice).

Equity jurisdiction may be auxiliary to, concurrent with, or exclusive of the jurisdiction of courts of law: auxiliary, as, for instance, a bill of discovery to aid a proceeding at law; concurrent, as, for instance, a suit at law for damages for a breach of contract, or a suit in Equity for specific performance of the contract; exclusive, as, for instance, a bill seeking the reformation

of a written instrument, a proceeding not permitted at common law.

If a court of equity has once properly obtained jurisdiction upon some Equity principle, it will retain such jurisdiction even to the extent of granting relief which a court of law also could adequately bestow (Williamson v. Monroe, 101 Fed. 322).

If every averment which would authorize a court of equity to take jurisdiction is found by the court to be not proved, the fact that the proof shows complainant has a legal demand against defendant for money loaned does not justify the court in retaining jurisdiction and entering a money decree, no reason appearing why the remedy at law is not complete and adequate (Brauer v. Laughlin, 235 Ill. 265). However, the Illinois Statute on Mechanic's Liens provides that if a lien claim fails, complainant may, in a proper case, obtain a judgment for money as at law. Mechanic's lien claims are adjudicated in Equity Courts not because such claims present issues recognized by courts of Equity, but only because the statute imposes such special remedy upon these courts, instead of common law courts.

In most of the courts of the United States the administration of equity jurisdiction is distinct and separate from the administration of common-law jurisdiction; and therefore Equity pleading is a distinct system of pleading. It is necessary for the student to understand the nature of a court of equity, also its principal maxims, and also the chief subjects of equity jurisprudence, in order to have an intelligent idea of the Equity system of pleading.

It may be said, further, that the courts of equity differ from those of common law as follows: At common law the defendant can be brought into court by an original writ before declaration filed; in equity he is brought in by a subpœna or summons after the bill is filed. At common law, oral evidence is offered before a jury in open court; in Equity, the evidence is reduced to writing, usually in the form of depositions, taken outside of court, and is afterwards delivered

in court and read to the court at the hearing of the cause. At law, the decision of the case is in the form of a judgment for the plaintiff or defendant in damages; in Equity, the decision is in the form of a decree, not merely in damages, but so framed as to suit all the varied necessities of each case.

The chief pleadings in an Equity case are: (1) the bill of complaint; (2) the demurrer, plea or answer of the defendant; and (3) the replication of the complainant.

BILLS IN EQUITY.

A suit in Equity, if brought by a private person, is begun by a Bill or Petition. If brought by the Attorney-General or State's Attorney on behalf of the Government or people, the complaint is called an Information.

As against limitation statutes, a suit in Illinois is not considered as begun until process or summons has been issued and *bona fide* delivered to the sheriff for proper service (Collins v. Manville, 170 Ill. 614). And a suit in Illinois is not considered as begun, so as to be notice to the world by *lis pendens*, until bill is filed and summons served, or appearance entered (Allison v. Drake, 145 Ill. 500).

Bills are: (1) Original, which begin a suit; and (2) Not Original, which are filed in a suit already begun.

Original Bills are (1) Bills of Complaint, wherein complainant seeks a decree determining his claims against the defendant, such as Bills for Specific Performance, for Foreclosure of Mortgages, for Breach of Trust, etc.; (2) Bills of Interpleader, wherein complainant seeks a decree determining not his own claims but those of rival claimants to property in his hands, that he may safely turn over the property to the rightful owner; and (3) Bills of Certiorari (now obsolete as a method of appeal), formerly chiefly used to transfer a case from an inferior to a higher court, in modern practice accomplished by statutory appeals and writs of error; (4) Bills of Discovery (now almost

obsolete, because parties to a suit can be compelled to testify), asking defendant to disclose facts in his knowledge, or for writings in defendant's control; (5) Bills to Perpetuate Testimony, or Bills to Examine Witnesses *de bene esse,* for the purpose of preserving evidence against loss through old age of witnesses, illness, or intended absence. The first three bills are known as bills praying for relief; the last two are known as bills not praying for relief.

Bills not Original are: (1) Supplemental Bills, setting forth facts occurring after bill filed and correcting bill to agree with such facts, or to introduce new party made necessary since bill filed; (2) Cross-bills, filed by defendant against complainant or co-defendant to avoid mere dismissal of bill and to get affirmative relief in same suit against complainant or co-defendant; (3) Bill to Impeach a Decree for Fraud; (4) Bill to Suspend a Decree under special circumstances or because of facts discovered after hearing of cause and after decree; (5) Bill to Carry a Decree into Effect, when, from neglect or other cause, it is impossible without a further order of court; (6) Bill of Revivor, to revive suit which would abate by death of party or other cause; (7) Bill of Review, to review, alter or reverse the decree for (a) error of law, or (b) for new matter discovered after decree.

TABULAR ANALYSIS OF BILLS IN EQUITY.

- Original bills.
  - Bills praying relief.
    - The ordinary bill in equity praying relief.
      - A bill praying relief as to rights claimed by complainant against claims of defendant.
    - Bill of interpleader.
      - Bill where complainant claims nothing for himself, but asks that the conflicting claims of the defendants respecting property in his hands be settled by a decree.
    - Bill of *certiorari*.
      - A bill praying for a writ to remove a cause to a superior court.
  - Bills not praying relief.
    - Bill to secure evidence.
      - To perpetuate testimony.
      - To examine witnesses *de bene esse*.
    - Bills of discovery.
      - Asking for facts in defendant's own knowledge,
        or
      - For records, deeds or writings under defendant's control, etc.

ORIGINAL BILLS.

An Original Bill usually has nine parts:

(1) The Address to the Court by correct title of court; example, "To the Judges of the.....Court of....., in Chancery sitting:" (U. S. Eq. rule 20.)

(2) The Introductory part, introducing the names, citizenship and abode of the parties, as: "A. B., a citizen of and residing in the County of....., in the State of....., brings this Bill of Complaint against C. D., a citizen of and residing in the County of .....in the State of....., and complains and avers as follows:" (U. S. Eq. Rule 20; 1 Smith 82; 1 Barb. 35.)

The names of parties do not occur in the caption or title to an Original Bill. (Spencer v. Goodlett, 104 Tenn. 648.)

(3) *The Stating Part:* Statements, allegations, averments of all principal facts showing *a right recognized by equity courts* in a clearly described subject-matter, and showing such right to be possessed by complainant and without being barred by laches, statutes of limitations, or statutes of frauds; also statements of all principal facts showing a *violation or threatened violation of that right* and naming *the defendants concerned in such violation;* also statements of facts showing the *names of all other persons as defendants having or claiming an interest in the subject-matter* of the suit, and statements showing the *citizenship and residence by state and county of all parties;* also statements of facts showing that *substantial injury to complainant, his family, or property,* and growing out of the subject-matter of the suit, has resulted or will result because of such violation; also statements of *such other facts as may be necessary to justify and explain each particular relief* prayed for, as for instance, complainant's statement of what he has done, or offers to do, in the way of equity on his part.

(4) The Confederating part, an averment that

defendants named confederated with other persons, unknown, and asking leave to join the latter when discovered. This part is obsolete, because now new parties can be added by amendment (Supervisors, etc., v. Miss. R. R. Co., 21 Ill. 367; also, U. S. Eq. rule 21).

(5) The Charging part, statements anticipating the defenses expected and meeting them with counter charges. It is in effect a special replication in anticipation of the answer expected (Supervisors v. Miss. R. R., 21 Ill. 368). Example: Defendant will pretend to have a written release of all claims; but plaintiff avers such pretended release was obtained by the fraudulent acts of said defendant, as follows, etc. The charging part is not necessary to a bill, except for the purpose of avoiding later amending the original bill, when the pleader knows matter confessing and avoiding the bill may be expected in the answer. If the stating part of the bill has not covered the anticipated defense, it may be well to do so in the charging part of the bill (Supervisors, etc., v. Miss. R. R. Co., *ante*. U. S. Eq. rule 21 authorizes omission of charging paragraph and permits statement of anticipated defenses in stating part.)

(6) The Jurisdiction clause, averring that complainant's case is within the jurisdiction of the court, and that except in a court of equity he has no remedy. This clause should not be used, and never was necessary. If the stating part of the bill does not show a proper case for Equity, this clause will not help, and its omission does no harm (Botsford v. Beers, 11 Conn. 369, 373; also, U. S. Eq. rule 21).

(7) Interrogatory or Discovery Part: A general interrogation or prayer that defendants answer each matter stated in the bill as fully as if specially interrogated thereon, not only according to positive knowledge, but upon their best recollection, information and belief; to which general prayer may be added a special prayer to answer a particular list of interrogatories seriatim set forth in this part of the bill (1 Dan. 486-8; 2 Dan. 238).

The general prayer for answer is usually called the

"general interrogatory;" and the list of questions, if added, is called the "special interrogatories." Whether this part of the bill consists of the general interrogatory alone or of both the general and special, it is the part of the bill *which seeks and obtains discovery* from the defendants to disclose the full truth in their answers as to all matters stated in the bill (16 Cyc. 223). And this is true whether the bill be one for discovery only or a bill for both relief and discovery, as is more usual (Hopkins v. Medley, 97 Ill. 414). The general interrogatory should never be omitted, though the special interrogatories are usually omitted, because the general interrogatory, unaided by statutes, requires the defendants to admit or deny each material allegation of fact set forth in the bill, with attending circumstances, or to deny knowledge or information or recollection thereof, and declare themselves unable to form any belief concerning them (1 Dan. 487; 1 Barb. 131). The peculiar nature of an answer in chancery, with its full responsive disclosures as well as matters of defense, so different from an answer at law, which need answer nothing so long as it sets up a defense, is due to the peculiar prayer for discovery in the chancery bill (Hopkins v. Medley, 97 Ill. 414; 1 Barb. 130).

U. S. Equity rules 39 and 40 excuse full answers where special interrogatories are omitted, if the answer sets forth a defense in bar or to the merits such as might be set forth in a plea.

In Illinois, by statute, this full answer must be made, whether answer under oath be waived or not (Sec. 23, Ill. Stat. Chan.; Hair v. Dailey, 161 Ill. 379). The effect of waiving answer under oath merely destroys the character of the answer as evidence, making it mere pleading (Bickerdike v. Allen, 157 Ill. 95); but the waiver of oath does not lessen the duty of the defendant to answer fully if he elects to answer instead of filing a plea or demurrer.

But in the Federal courts, under Equity rule 39, defendant is permitted to file and set up in his answer all matters of defense in bar or to the merits,

which he might also have set up by plea, without answering other matters except such as he must have answered, if a plea filed would have required an answer in its support. Under this rule it would seem that a plea may be filed under the name of an answer.

(8) The Prayer for Relief, wherein the complainant prays the court to decree and order the defendant to do or refrain from doing certain things mentioned in the prayer, and wherein complainant also prays in general "for such other and further relief as may be just and equitable." If the specific prayer is erroneous, the court will, under the general prayer, grant such relief as may be proper (Casstevens v. Casstevens, 227 Ill. 547). In the absence of a general prayer, this could not be done (Driver v. Fortner, 5 Port. Ala. 9; Wilkin v. Wilkin, 1 Johns. Ch. 111).

If an injunction is sought, complainant should specifically pray for a decree enjoining the particular acts complained of as threatened in the stating part of the bill, because the writ of injunction, if obtained, should follow the prayer, and will be limited by it. The general prayer for relief is not a sufficient basis for the writ of injunction ordinarily (Story Eq. Pl., Sec. 41); and if any other special writ or order, is sought, complainant should pray for same in this part of the bill. A writ of *ne exeat* being an emergency writ can be obtained by petition. No prayer is necessary (1 Smith, 86). Statutes usually permit the writ of *ne exeat* to issue upon special petition, whether or not prayed for in the prayer of the original bill.

(9) Prayer for Process, asking the court to grant issuance of process or writ of summons, commanding defendants to appear and answer the bill, and to grant other writs desired.

When injunction is prayed for, the prayer for process should also ask the court to grant the issuance of a writ of injunction against the defendant. But see U. S. Eq. rule 23). The prayer for process must name the defendants to whom the writ is to issue (1 Smith 85; 1 Barb. 38), and the Prayer for the Injunction

Writ should name the persons against whom the writ of injunction is to issue.

If any defendants are infants or otherwise under guardianship, the fact should here be stated or recited, so the court may make order thereon as justice may require upon the return of the process (U. S. Eq. rule 23).

The above is a brief summary of the nine parts of a bill. The Confederacy Clause should be omitted. The Charging Part may be used or not, as advisable. The Jurisdiction Clause should be omitted. The general interrogatory part is used, but the special interrogatories are used only when desired.

The bill should always be signed by the solicitor for the complainant. When injunction is prayed, the bill should be sworn to by the complainant. Otherwise, unless the statute requires it, no oath to the bill is necessary if answer under oath is waived (1 Barb. 44).

STATING PART OF THE BILL, CONTINUED.

A party seeking aid of a court of equity must show all the facts necessary to entitle him to that aid Campbell v. Powers, 139 Ill. 128; Waugh v. Robbins, 33 Ill. 182). The right, title and interest of the complainant should be stated with accuracy and clearness, and the proof in the case must correspond with the allegations (Fitzpatrick v. Beatty, 6 Ill. 454). The material allegations of the bill must be clearly and positively averred (Primmer v. Patten, 32 Ill. 528), and in a traversable form (Stow v. Russell, 36 Ill. 18), and not by way of recital; and a party cannot have relief upon a case not stated in his bill (Page v. Greeley, 75 Ill. 400; Morton v. Smith, 86 Ill. 117; Angelo v. Angelo, 146 Ill. 629). But the claims of the defendant may be stated in general terms (Story's Eq. Pl., Sec. 255). Where the extent and character of defendant's rights are more within the knowledge of defendant, it is sufficient to allege generally that the defendant has or claims to have some rights in the

subject-matter of the suit, leaving him to disclose in his answer the nature and extent of such rights (Morgan v. Smith, 11 Ill. 194).

The citizenship and residence by state and county of complainants and defendants should be distinctly averred because it is usually one of the grounds of the court's jurisdiction. For example: section 3 of the Illinois Chancery Act requires a suit to be begun in the county in which one or more of the defendants reside and in this state a complainant in a suit for divorce must have resided one year in the state. The jurisdiction of the federal courts often depends upon the diverse citizenship of the parties (Turner v. Bank, 4 Dall. 8).

Here in the stating part (U. S. Eq. rule 21) as well as in the charging part, the complainant may anticipate a defense and allege any matter necessary to explain or avoid it; or, omitting to do so, on the coming in of the answer with new matter, complainant may meet this new matter by an amendment to the bill (White v. Morrison, 11 Ill. 361; Harding v. Durand, 138 Ill. 515).

In narrating the facts, only the main or ultimate facts need be alleged, without stating the circumstances or evidence of such main facts (Story's Eq. Pl., Sec. 28).

Every case at law or in equity involves: (1) determining and declaring the main facts, *findings of fact;* (2) determining and declaring the legal meanings, effects or consequences of the facts (that is, determining the rights and duties consequent upon the facts, also spoken of as "applying the law to the facts"), *findings or conclusions of law upon the facts;* (3) commanding the enforcement of the legal consequences of the facts, *the mandate of the court enforcing the law upon the facts.*

A careful lawyer will first possess himself of and keep in hand the clear evidence of all necessary facts; he will then clearly plead the main facts which make his case; he will then clearly prove the pleaded main facts by his evidence; he will then present to the judge

a prepared decree clearly finding those main facts as pleaded, clearly finding the law (or rights and duties involved in those facts), and clearly ordering the particular acts or conduct necessary to enforce such rights and duties. The careful lawyer will be sure he has the facts; he will be sure to plead them; he will be sure to prove them; he will be sure his decree finds them and enforces their legal consequences. His bill or defense must check with each necessary fact; the proof must check with each allegation of fact in his pleading; the decree must check with the allegations and proofs. These requirements are fundamental.

In the opinion of the writer, a lawyer should write his decree before he draws his bill. A properly drafted decree contains the whole case from beginning to end. After writing a decree finding the facts, finding the rights and duties involved in those facts, and ordering the acts to be done which enforce those rights, a lawyer will thoroughly understand his case; otherwise, he will not see his whole case, and mistakes may occur. The decree may as well be written first as last, and nothing, in the experience of the writer, prevents more mistakes or better clears the way than writing a decree before the bill. The decree certainly should be drafted before entering upon the proofs, because its completion usually brings to light the need of additional or amended allegations with which proofs must correspond, and thus mistakes or omissions in the proof are avoided.

In pleading, one should state the main or ultimate facts constituting the complaint or defense, instead of evidentiary facts. (Larvis v. Wis. Cent. 54 Ill. App. 636). He should leave legal conclusions *or findings of law* for the court to draw, and never plead them except to add to the clearness of facts stated and warranting the conclusion, especially if a court might otherwise miss the legal effects of facts stated. Example: "Said defendant obtained said deed by fraudulent representations as follows:" (here state facts of fraud). In spite of the current of decisions against pleading conclusions of law, the writer thinks they are frequently

used and are often necessary for clear pleading: and if they are accompanied by the facts which warrant them, they entail no harm and at the worst must be treated as surplusage. Courts even encourage pleading the legal effect of instruments rather than pleading them *in hæc verba.*

All matters of inference or argument are impertinent and will be expunged, usually with costs (Sheldon v. Robbins, 2 Root 190).

Whatever is intended to be proved should be alleged, otherwise evidence cannot be received of the facts (Crockett v. Lee, 7 Wheat. 522; Story's Eq. Pl., Sec. 28).

Complainant must allege in his bill that he has done or offered to do or is ready to perform everything necessary to entitle him to the relief he seeks, or a sufficient excuse for its non-performance (DeWolf v. Pratt, 42 Ill. 198). It is a maxim of equity that he who seeks equity must do equity (Winslow v. Noble, 101 Ill. 194).

When a bill is filed long after the cause of action accrued the facts relied upon as excusing the delay must be set forth in the bill; otherwise the bill will impute *laches;* and may be attacked by demurrer or plea, or the court of its own motion may refuse to consider the case. (Sullivan v. Railroad, 94 U. S. 806).

A bill may be framed with a double aspect, so that if one ground fail the complainant may rely upon the other, which may be inconsistent with the former (Varick v. Smith, 5 Paige Ch. Rep. 137).

Where relief is sought on the ground of fraud or usury, general charges should be followed by allegations in which the circumstances and facts upon which the charge is founded are fully and specifically stated (Newell v. Bureau County, 37 Ill. 253; Smith v. Brittenham, 98 Ill. 188; Goodwin v. Bishop, 145 Ill. 421; Brewing Company v. Wolford, 179 Ill. 252). Fraud cannot be alleged by mere statement of conclusions, as, for instance, a statement that the defendant obtained certain property by "fraud and misrepresentation." There must be a distinct averment of the facts and

circumstances constituting the fraud, so that the court, if there was no appearance, could from the allegations and the proof supporting them find that a fraud had been committed, and so that the defendant may be able to answer and explain such facts and defend the charge (Toles v. Johnson, 72 Ill. App. 182).

If an allegation be capable of two meanings, the one most unfavorable to the pleader will be adopted (Halligan v. R. R. Company, 15 Ill. 558).

If a bill makes an instrument a part thereof, without annexing a copy or setting forth the contents, it is bad on demurrer (Martin v. McBryde, 3 Ired. Ch. 531). Exhibits forming a part of the bill, will aid defective statements in the bill (Benneson v. Savage, 130 Ill. 352).

The practice of allowing *oyer* is unknown in chancery (Hamilton v. Downer, 152 Ill. 651). *Oyer* means the right to see, or hear read, some document in court as a part of the pleadings.

The bill must cover the whole subject in dispute, so as not to expose the defendant to be harassed by another suit when one suit may suffice (Purfry v. Purfry, 1 Vern. 29; 1 Barbour's Ch. Pr., 40).

Bills of Interpleader: Where two or more persons claim the same property in different titles, whether legal or equitable, from another, who is in the position of an innocent stakeholder, the latter, if molested by a suit actually brought or threatened, may file his Bill of Interpleader, for the purpose of compelling the claimants to litigate their rights at their own expense, and thus protect himself from all vexation and responsibility (McClintock v. Helberg, 168 Ill. 384).

Such bill will lie only where the same thing, debt or duty, is claimed by both or all of the defendants by different or separate interests (Ryan v. Lamson, 153 Ill. 520); where all their adverse titles or claims are derived from a common source, and where the complainant has no claim or interest in the subject-matter or controversy. It will not lie after a judgment at law on the claim in favor of either or both of the claimants (Hathaway v. Foy, 40 Mo. 450).

It is not necessary for the holder of the fund to file a Bill of Interpleader when he is already a party to a suit in chancery brought by one claimant against the other to settle the right to the fund. In such case the holder of the fund should apply, by petition in that suit, for leave to pay the money into court, to abide the event of the litigation between the other parties (Badeau v. Rogers, 2 Paige Ch. 209).

MULTIFARIOUSNESS.

The bill must not be multifarious. A bill is multifarious (1) when it unites several distinct and incongruous matters between the same parties; or (2) when it unites several matters in all of which the complainants on the one side or all the defendants on the other do not have a joint and common interest (Metcalf v. Cady, 8 Allan, 587; Walker v. Powers, 104 U. S. 245; Story's Eq. Pl., Sec. 271, Gage v. Parker, 103 Ill. 528). A bill to avoid a multiplicity of suits is an exception to this general rule. The rule itself is no hard and fast rule. It rests somewhat upon the discretion of the court, depending upon considerations of convenience to the court, avoidance of a multiplicity of suits, and avoidance of hardship to the parties (No. Am. Ins. Co. v. Yates, 214 Ill. 272).

The objection for multifariousness is waived by answering and submitting to trial on the merits (Bird v. Bird, 218 Ill. 158).

IMPERTINENCE AND SCANDAL.

A bill must not contain impertinent or scandalous matter. Impertinent matter is that which is wholly irrelevant and unnecessary, and thus tends to make the record improperly voluminous and expensive (Woods v. Morrell, 1 Johns. Ch., 103). A bill is scandalous when it introduces irrelevant matter which is also libelous or defamatory in character. It must be irrelevant to be scandalous. It may often be necessary, in cases of fraud, to make allegations very injurious

to the character of the parties concerned: "Nothing which is positively relevant to the merits of the cause, however harsh or gross the charge may be, can be correctly treated as scandalous" (Story's Eq. Pl., Sec. 269). The objection that a bill is impertinent or scandalous is made by exceptions, not by demurrer. These exceptions are filed to the bill, and state what parts are objected to on these grounds (Stirrat v. Excelsior Mfg. Company, 44 Fed. Rep. 142). When such objection is made, the court refers the matter to a master for examination, and if the charge is sustained the matter is ordered to be stricken out, and the plaintiff will be required to pay costs. If the scandal is gross and wanton, the counsel who is guilty of it may also be subject to the discipline of the court for a violation of his duty as an officer of the court (Reichl v. McGrath, L. R. 14 App. Cas. 665). Any unnecessary allegation bearing cruelly upon the moral character of an individual is scandalous (Coffin v. Cooper, 6 Ves. 514). Neither suitors nor solicitors should be allowed to manifest their personal feelings upon the records of the court (McConnel v. Holobush, 11 Ill. 61).

BILLS NOT ORIGINAL.

Supplemental Bills: A Supplemental Bill is one brought by the plaintiff in the original suit to introduce some material fact affecting the case which has occurred since the beginning of the suit; or to introduce some new party who has become necessary since the beginning of the suit (Wilder v. Keeler, 3 Paige, 164). If the Original Bill shows no ground for relief, the defect cannot be cured by a Supplemental Bill setting up matters that have arisen since the commencement of the suit (Hughes v. Carne, 135 Ill. 519).

Matters which occurred prior to the filing of the bill, and not stated therein, should be brought into the suit by amendment; but matters arising subsequent to the filing of the Original Bill must be introduced by a Supplemental Bill (Burke v. Smith, 15 Ill. 158; McDonald

v. Asay, 139 Ill. 123). The Supplemental Bill must be germane to the Original Bill (Miller v. Cook, 135 Ill. 190).

Bills of Revivor: A Bill of Revivor is the proper mode of reviving a suit which otherwise would abate by the death of the plaintiff or the defendant (Bowie v. Minter, 2 Ala. 406). In Illinois, a bill to revive on account of death is not necessary, for it is provided by statute that representatives of deceased parties may be made parties by suggesting the death upon the records of the court, when the case will proceed as in other cases (Illinois Statute on Abatement). In Illinois, therefore, a bill to revive before a final decree is unnecessary.

Bills of Review: A Bill of Review is in the nature of a writ of error, and its object is to procure an examination or modification or reversal of a decree rendered upon a former bill. It lies only after the term of court at which the final decree was entered has expired. Until a final decree has been passed, a court of chancery has full power over all the proceedings in the case, and can alter or annul any decree, and can, *on mere motion, rehear the case,* if it thinks proper so to do (Pitman v. Thornton, 65 Me. 95). The bill must be brought in the same court in which the final decree in the original suit was passed (Tansey v. McDonnell, 142 Mass. 220). Leave of court must be obtained before a Bill of Review can be filed. It lies for error apparent on the record, or for material evidence not known in time for its use at the former trial, and not discoverable by reasonable diligence at that time (Egbert v. Gerding, 116 Ill. 216). It is proper after a decree is enrolled.

A Bill of Review for error apparent on the face of the record must be for an error in law arising out of the facts admitted by the pleadings or recited in the decree itself, as settled, declared or allowed by the court. It cannot be sustained upon the ground that the court has decided wrongfully upon a question of fact (Fellers v. Rainey, 82 Ill. 114); but if there has been an erroneous application of the facts found by a

decree, the court may review or reverse the decree by a Bill of Review (Jackson v. Jackson, 144 Ill. 274). Errors of law against which relief can be had by a Bill of Review must be such as arise rather from obvious mistake or inadvertence appearing on the face of the decree, or at least of record, than from alleged error in the deliberate judgment of the chancellor on a debatable question of law or equitable right (Caller v. Shields, 2 Stewart & Port. 417). It cannot be brought upon the ground that the former decree was not supported by the evidence (Whiting v. Bank, 13 Pet. 6), and no evidence is admissible as to the facts established by the original decree (Judson v. Stephens, 75 Ill. 255). The error must appear on the face of the pleadings and decree, for the evidence in the case at large cannot be looked into to ascertain whether the court misunderstood the facts (Bruschke v. Verein, 145 Ill. 433); that is the proper province of the court of appeal. But, taking the facts to be as they are stated to be on the face of the decree, it must be shown that the court has erred in point of law.

Upon a Bill of Review, a court will revise, correct or reverse its own decree for an erroneous application of law to the facts found, whenever a court of appeals would do so for the same cause (Moore v. Bracken, 27 Ill. 23).

A Bill of Review lies for newly discovered evidence material to the issue, if such evidence was not known until after the trial of the cause (Yates v. Monroe, 13 Ill. 212). Mere cumulative evidence is not sufficient. Unless discovered after the decree is pronounced, it is not ground for a Bill of Review (Watts v. Rice, 192 Ill. 123).

The only distinction between a petition for a rehearing in chancery and a Bill of Review for the same cause is that the former is to be invoked before the enrollment of the decree and the adjournment of the term, while the latter is available after the decree and adjournment (Elzas v. Elzas, 183 Ill. 132).

Cross-bills: A Cross-bill is one brought by a defendant against the complainant in the same suit, or

against other defendants, or against both, touching the matters in question in the Original Bill, for the purpose of obtaining affirmative relief (Lloyd v. Kirkwood, 112 Ill. 329).

Under an Original Bill, the court must simply grant or deny the relief asked for by the plaintiff. It cannot proceed, after denying relief to the plaintiff, to give any specific relief to the defendant, although the justice of the case might manifestly require it (Howe v. South Park Commissioners, 119 Ill. 101). The main purpose of a Cross-bill by defendant is to ask for such relief as the case may show him to be entitled to; and upon such a bill the court can proceed to give the proper relief (Shields v. Bush, 189 Ill. 534). There are some exceptions: It is unnecessary to file a Cross-bill where (on the failure of a bill for specific performance) it appears that earnest-money has been paid by the defendant; and a decree for the repayment of the earnest-money will be given without the filing of a Cross-bill (Adams v. Valentine, 33 Fed. Rep. 1); also, upon a bill for an accounting, the party against whom the balance is found will be decreed to pay it without a Cross-bill (Acme Co. v. McLure, 41 Ill. App. 397).

A Cross-bill must contain matter germane to the Original Bill and must not contradict allegations in the answer filed (Ballance v. Underhill, 3 Scammon, 453).

A defendant, to take advantage of a defense arising *pendente lite,* must assert it in the form of a cross-bill praying a dismissal of the original; this procedure taking the place of a plea *puis darrein continuance* at common law (Mills v. Larrance, 186 Ill. 635). By strict practice, this course must also be taken where the defense affects only a co-defendant (Metropolis Nat. Bank v. Sprague, 21 N. J. Eq. 530).

Where the matter of a cross-bill is equally available in the answer, by way of defense to the original bill, a cross-bill is unnecessary (Wight v. Downing, 90 Ill. App. 1). The rule is that where all the objects sought can be attained by answer, a cross-bill will not be permitted (Hook v. Richeson, 115 Ill. 431).

In Illinois lien defendants in a foreclosure suit need not file a cross-bill in order to have their rights determined. Such rights may be determined upon their answers (Gouwens v. Gouwens, 222 Ill. 223, 78 N. E. 597).

In Illinois in foreclosure suits, defendants claiming liens against the premises in their answers, whether such liens are junior mortgage liens, judgment liens, or otherwise, are entitled without filing a cross-bill to have the court determine the existence and priority of such liens and to order the premises sold for complainant and the proceeds of sale to be distributed according to the priority of the liens (Gardner v. Cohn, 191 Ill. p. 553). But if a junior lienor desires relief beyond sharing in the surplus proceeds of sale, such as a decree ordering a sale if his debt is not also paid as well as the debt of complainant, a cross-bill is necessary (Campbell v. Benjamin, 69 Ill. 244).

Where the matter of the cross-bill constitutes a defense and at the same time entitles defendant to relief beyond the dismissal of the bill, and such relief cannot be had by answer, a cross-bill is proper (Paxton v. Stackhouse, 4 Kulp. (Pa.) 403). A cross-bill may be permitted to insure relief to defendant, where he would be deprived thereof if plaintiff should fail in his proof (Wilcox v. Allen, 36 Mich. 160).

Defendants to cross-bill: A cross-bill requires the same parties defendant as would an original bill for the same purpose (McGillis v. Hogan, 85 Ill. App. 194). Whether the cross-bill must fail if all necessary parties to it are not already parties to the original suit, or whether new and necessary parties may be brought in on the cross-bill, is a question upon which the practice is not uniform. In some jurisdictions it is held that new parties cannot be introduced by a cross-bill (Wright v. Frank, 61 Miss. 32; Shields v. Barrow, 17 Howard 130); in others the practice of bringing in new parties is provided for by statute (Scott v. Millikin, 60 Ill. 108). Plaintiff in the original should be a necessary defendant in a cross-bill, although it be directed mainly against a co-defendant;

because a controversy between defendants cannot be made the ground of a cross-bill unless its settlement is necessary to a complete decree on the case made by the bill (Weaver v. Alter, 3 Woods 152).

Form of Cross-bills: A cross-bill must have all the essential parts of an original bill (McCagg v. Heacock, 42 Ill. 153). It must be so framed that both original and cross causes may be heard together, and a single decree entered (McDougald v. Dougherty, 14 Ga. 674). Formerly a cross-bill, in addition to having all the parts of an original bill for the same purpose, used to state the original bill so far as to show its parties, scope and object, and what proceedings had been had thereon (Mitford Eq. Pl. 75). But this requirement was due to the fact that a cross-bill in England might be filed in a court other than the one in which the original suit was pending. In the federal courts, a cross-bill must be filed in the same court as the original; and it is necessary only to set forth so much, with regard to the original and the proceedings thereon, as may be necessary to disclose the right sought to be brought before the court (Neal v. Foster, 34 Fed. 496).

Defenses to Cross-bills. A defendant to both original and cross-bill must interpose his defense separately to each (Crutcher v. Trabue, 5 Dana (Ky.) 80). The modes and grounds of defense are substantially the same as to an original bill (Barker v. Belknap, 39 Vt. 168).

The Illinois statutes contain the following provisions respecting cross-bills:

Any defendant may, after filing his answer, exhibit and file his cross-bill and call upon the complainant to file his answer thereto, in such time as may be prescribed by the court. It shall not be necessary to recite in the cross-bill any of the pleadings or proceedings in the case in which it is filed; and it shall not be necessary to pray process, except against new parties. The complainant shall be required to except, plead, demur or answer to such cross-bill in the same manner that a defendant is required to except, plead, demur or answer to an original bill, and his answer shall have

the same effect as a defendant's answer to a bill. If the complainant shall fail to answer such cross-bill, his bill shall be dismissed with costs, or the new matter set out in the defendant's cross-bill shall be taken as confessed, and a decree entered accordingly. Where it is necessary for the defendant to bring a new party before the court, he shall state it in his cross-bill, and the summons shall be issued, and other proceeedings had, as in the case of other defendants. The complainant shall not be compelled to file his answer to any cross-bill until the defendants shall have filed a sufficient answer to the complainant's bill. No complainant shall be allowed to dismiss his bill after a cross-bill has been filed, without the consent of the defendant (Ill. Stat. Chan. sec. 30-36).

In Illinois, under the statute, filing a cross-bill does not require leave of court (Quick v. Lamont, 105 Ill. 578).

Bills not original.

- (1) Supplemental bills. — Bills correcting some defect in the suit, resulting from facts occurring or discovered after original bill is filed.
- (2) Cross bills. — Bill filed by defendant in original suit to obtain affirmative relief in the same suit.
- (3) Bill to impeach decree, — For fraud in obtaining decree.

or

- (4) To suspend a decree, — For special reasons.

or

- (5) To carry decree into effect, — When for some reason it is impossible without the further order of the court.

or

- (6) Bill of revivor. — Bill to revive the original suit when from some cause—as the death of a party—the suit would abate.
- (7) Bills of review. — A bill to review, alter or reverse the decree.
  - (1) For error in law.
  - (2) For new matter discovered after decree, which with diligence could not have been discovered before.

APPEARANCE AND TIME TO FILE PLEADING.

To prevent the entry of a default, the defendant must, either personally or by his solicitor, enter his appearance on or before the day to which the process is made returnable, provided he was served with process in due time before that day; otherwise, the appearance day shall be the next rule day succeeding the day when the process is returnable. (U. S. Eq. Rules 17, 18; Ill. Stat. Chan. sec. 16). A defendant may waive the service of process, or, being served, may waive the time allowed him, and enter his appearance either personally or by his solicitor.

In the United States chancery courts, unless otherwise ordered by a judge of the court, for cause shown, the defendant, to prevent a default being entered, must file a plea, demurrer or answer to the bill on the rule day next succeeding the rule day upon which his appearance was entered (U. S. Eq. Rules 18, 32).

Filing an answer is an appearance. Appearance cures all defects of process or of service of process (1 Barb. 78), and also cures defects of jurisdiction unless the appearance is expressly limited upon the record for specified purposes. An infant's appearance is entered by his guardian *ad litem.*

Section 44 of the Illinois Practice Act, permits the court, upon the appearance of the defendant, to allow such time to plead as may be reasonable or necessary.

Cook County Chancery Rule I, provides that if a defendant, properly summoned, enters his appearance before default taken, he shall thereby, without any order, have twenty days from the first day of the appearance term, within which to except, demur, plead or answer; also that when a defendant not properly summoned, enters his appearance, he must give complainant's solicitor immediate notice of the fact, and file his pleading within twenty days after such appearance.

DEFENSE TO BILLS.

The defenses to a bill may be (1) by a Demurrer, (2) by a Plea, (3) by an Answer, or (4) by a Disclaimer.

Each of these defenses may go to the whole bill or to only a part of it; so that, as to one part, the defendant may demur, as to another he may plead, as to a third he may answer, and as to a fourth he may disclaim, according to the nature of the case (1 Barb. 173). In most cases, however, unless t he bill presents divisible claims, only one defensive pleading at a time is filed.

DEMURRER.

A demurrer is a pleading by the defendant asserting that the plaintiff's case, taking it just as he states it, gives him no right to any relief (Lincoln v. Purcell, 2 Head, 143). A demurrer is based upon a ground of defense apparent from statements in the bill or upon the omission of matters which should appear in the bill (1 Barb. 105).

A demurrer grants the truth of every fact well pleaded in the bill (Gage v. Bailey, 115 Ill. 646). It does not grant any matters of law which may be suggested in the bill or may be inferred from the facts stated in the bill (Dillon v. Barnard, 21 Wall. 430), nor any fact that is not specifically charged (Stowe v. Russell, 36 Ill. 18; Trust Co. v. R. R. Co., 157 Ill. 641). In hearing a demurrer, the argument is strictly confined to the case appearing from the bill; and for the purpose of argument the matters of fact stated in the bill are deemed to be true (East India Co. v. Hinchman, 1 Ves. Jr. 289). A demurrer cannot invoke in its support any fact whatever which is not contained in the bill (Story's Eq. Pl., Sec. 453, Note 3), excepting those facts of which the court takes judicial notice (1 Daniell's Ch. Pr., 546, and Notes to 6th Am. Ed.). When the demurrer invokes some fact not apparent upon the face of the bill, it is called a *speaking demurrer,* and will be overruled.

Demurrers are *general* when no particular defect is pointed out and there is only the general statement that there is no equity in the bill. A general demurrer is properly overruled if the bill makes a case in equity (Langlois v. McCullom, 181 Ill. 195).

Demurrers are *special* when a particular defect in a bill is pointed out . If a demurrer is filed because of a formal defect in the bill, it must be a special and not a general demurrer (McCloskey v. McCormick, 44 Ill. 336). A special demurrer (followed by a general one) is preferable in any case. It sets forth on the record the objections intended to be raised.

Demurrer, ore tenus: Where the demurrer runs to the whole bill, and not merely to some parts of the bill, and the causes of demurrer are assigned or pointed out, if those causes are overruled, the demurring defendant will be allowed to assign other causes of demurrer, *ore tenus;* that is to say, orally, at the argument (Story's Eq. Pl., Sec. 464).

Effect of sustaining a demurrer: A demurrer to the merits of the whole bill, if sustained, results in a decree dismissing the bill (1 John. Ch. Rep. 184); but the sustaining of a demurrer to a part of the bill or of a special demurrer on matters of form, *or where the court can see that the objections to the bill can be obviated by amendment,* will not result in a dismissal of the bill, but the court will grant leave to amend (1 Daniell's Ch. Pr. 524). If no leave to amend is asked, the bill will be dismissed (McDowell v. Cochran, 11 Ill. 31).

Effect of overruling demurrer: If a demurrer is overruled, the defendant unless he abides by his demurrer, is ordered to answer; and if he does not do so, the bill is taken as confessed. (Bruschke v. Verein, 145 Ill. 433).

A party who files a plea or answer after his demurrer has been overruled, thereby waives the right to assign the overruling of his demurrer as error, and thus he waives the demurrer, unless and so far as the bill fails to set forth a cause of action, or unless the

case presents jurisdictional defects (Cline v. Cline, 204 Illinois, 130; Baumgartner v. Bradt, 207 Illinois, 345).

A defendant who does not bring his demurrer to a hearing, thereby waives it (Long v. Fox, 100 Ill. 43).

Affidavit of non-delay: In the United States courts, the defendant must certify, in the form of an affidavit, that the demurrer is not made for the purpose of delay (31st Rule of Prac. U. S.).

The causes for demurrer may relate to the following classes: (1) to the jurisdiction of the court; (2) to the character or number of the parties; (3) to the form of the bill; or (4) to the substance of the bill.

1. *A demurrer to the jurisdiction* is to the effect that it is apparent from the bill that the court in which the suit is brought has no jurisdiction over the parties or over that particular case. This is common in the courts of the United States, which have jurisdiction only over specified matters and persons; and even in Illinois parties must be sued in the county where the defendants or some of them reside (Munger v. Crowe, 219 Ill. 12). The proper mode of raising this point is by demurrer; but, being a matter of jurisdiction, the court itself will take notice of it, and will dismiss the bill whenever this objection becomes known (Dodge v. Perkins, 4 Mason, 435). (*Caution:* If the want of jurisdiction is not apparent from the bill, and the facts stated in the bill show jurisdiction, and these facts are not true, then the objection to the jurisdiction must be raised by a plea averring the true facts. Pleas will be considered later.)

2. *Demurrer on account of character or want of parties:* If the complainant's incapacity to sue appears in the bill, the objection should be raised by demurrer (1 Daniell's Ch. Pr. 287); for example: if infant sues alone and not by "next friend." (*Caution:* If the bill does not show that complainant is an infant, when in truth such is the fact, then the objection must be raised by plea averring the fact of such infancy). The omission of an indispensable party as plaintiff or defendant, if the omission appears on the face of the bill, can

be raised by demurrer (Lyman v. Bonney, 101 Mass. 562).

3. *Demurrer to the form of the bill:* The principal objection to the form of the bill is that it is multifarious. Other grounds of formal demurrer are that the bill was not signed by counsel, or it omits prayer for process, or the form of relief prayed for is entirely misconceived, as when the bill is framed to remove a mortgage as a cloud on a title, when it should be framed for the right to redeem from the mortgage.

4. *Demurrer to the substance of the bill:* Among grounds of demurrer to the substance of the bill are the following:

(a) That the bill shows *no right in complainant to sue* for the relief (Oakey v. Bend, 3 Edw. Ch. 482).

(b) That the bill shows that complainant's *right to sue is barred by the statute of limitations* (Wisner v. Barnet, 4 Wash. 631).

(c) That the bill shows that complainant has *lost his right to sue by gross laches* (Maxwell v. Kennedy, 8 Howard, 210).

(d) That the bill shows that complainant's *right to sue is void under the statute of frauds* (Chambers v. Lecompte, 9 Mo. 566).

(e) That the bill shows *no cause of liability against the defendant* (Crane v. Deming, 7 Conn. 387).

(f) That the bill shows that complainant *has a sufficient remedy at law* (Aholtz v. Goltra, 114 Ill. 241).

(g) That the bill shows there is *another suit pending* for the same matter.

Whenever any other ground of defense is apparent in the bill itself, either from matters therein alleged, or from a failure to allege some fact essential to sustain complainant's right to relief, or where there are other important defects apparent in the frame or substance of the bill, a demurrer should be filed to save the expense of answering and taking evidence.

If the defect is a matter of form, the failure to demur may be deemed to be a waiver of the objection (Nat. Bank v. Carpenter, 101 U. S. 567).

PLEAS.

Pleas raise a question of fact. Demurrers raise a question of law. A demurrer is based upon a defect apparent from the bill; a plea is based upon an objection not apparent in the bill (1 Barb 114). A plea either denies a single fact essential to complainant's case, or it sets up a new fact which is a complete defense to the case or to that part of the bill to which it is raised. If a plea is sustained, it saves the case to the defendant, without making full answer to the bill.

Pleas are either *pure pleas* or *negative pleas;* a pure plea being one which sets up in the plea a defensive fact not mentioned in the bill, namely, a plea confessing and avoiding; as, for example, a plea that the plaintiff has given a release of the claim (Gardner v. Watson, 18 Brad. (Ill.) 386). A negative plea is one which negatives or denies some essential fact stated in the bill, without which fact the bill cannot be maintained, thus raising a complete defense to the whole suit (Spangler v. Spangler, 19 Brad. (Ill.) 28.) Example: Where a bill is brought by one as heir, a plea denying that the plaintiff is heir is a negative plea, being a complete defense to the bill; because, if the plaintiff is not an heir, then he has no title upon which to support his bill.

Every plea, whether pure or negative, must present but one issue of fact. If it raises two or more issues, it is tainted with duplicity and is fatally defective (1 Barb. 116; Story's Eq. Pl. 654). To raise two or more issues, an answer and not a plea should be filed.

With three exceptions, there must be no answer on the point covered by a plea on file; for the answer will be taken to overrule the plea when both cover the same parts of the bill (Grant v. Phœnix Life In. Co., 121 U. S. 105). The three exceptions are cases in which a plea must be accompanied by an answer supporting the plea; and each case depends on the frame of the bill:

(1) Those cases where the complainant admits the

existence of a legal defense, but charges some equitable circumstance to void its effect; as, for example, where the plea sets up a release. If the complainant has anticipated this defense in his bill and has averred that the release was obtained from him by mistake, and sets out the facts tending to prove such mistake, and asks for discovery as to them, the defendant, if he puts in a plea setting up the release, should accompany such plea by an answer denying the mistake (Foster v. Foster, 51 Vt. 216); and should also answer fully as to the facts charged in the bill as constituting the mistake in obtaining the release (Chapin v. Coleman, 11 Pickering, 331; President v. Wilson, 9 Ill. 57).

(2) Wherever the bill, by way of proving the complainant's title, sets forth any facts or circumstances as being within the defendant's knowledge, a plea denying the title must be accompanied by an answer and discovery as to such facts and circumstances. Example: Where a bill proceeds upon the title of the complainant as heir, and for evidence of such title states certain facts as being within the defendant's knowledge, if the defendant puts in a plea denying that the plaintiff is the heir, it must be accompanied by an answer as to the facts alleged to be within his knowledge, and which he is called upon to discover.

(3) It is a rule that where a bill specifically charges fraud or conspiracy, a plea to that part of the bill must be accompanied by an answer explicitly denying the fraud or conspiracy and the facts upon which the charge is founded (U. S. Eq. Rule 32).

A plea generally runs to the whole bill, but in cases where the claim of the plaintiff is divisible in its nature, and one part of it is open to some special defense, which does not apply to the rest, a plea may be proper for such part.

Testing the legal sufficiency of a plea: A plea in equity is not demurrable. If the plaintiff thinks it is not good law, he *sets the case down for hearing on the sufficiency of the plea* (Lester v. Stevens, 29 Ill. 155). When a plea is thus set down for argument as to its sufficiency in law as a defense, its truth, for

the sake of argument, is deemed to be admitted (Gouwens v. Gouwens, 222 Ill. 223). If the plea is adjudged good, the plaintiff must then take issue upon the plea by replying to it, and the question of fact raised by the plea will be tried. If the plea is adjudged bad, the defendant will be allowed to make answer to the bill (Rhode Island v. Mass., 14 Peters, 210). If the plaintiff takes issue on the plea by filing a replication to it, he admits its sufficiency in law as a pleading to his bill, and the only question open is whether or not the plea is true in fact (Bean v. Clark, 30 Fed. Rep. 225).

Effect of going to hearing upon Bill, Plea and Replication: If, upon the hearing of the issue of fact, the finding is in favor of the defendant, the effect thereof depends upon the nature of the issue or facts determined upon the plea, the defendant being entitled to the benefit thereof only so far as in law and equity they ought to avail him (Farley v. Kittson, 120 U. S. 303; Hughes v. Blake, 6 Wheaton, 453; Horn v. Dry Dock Co., 150 U. S. 610; Green v. Bogue, 158 U. S. 478). Usually a final decree is entered upon such a hearing or trial.

The allegations of fact in the plea, though under oath, are not evidence in favor of defendant. The taking of the evidence upon an issue of fact arising upon a plea, and reply thereto, is governed by the rules applicable to an issue arising upon an answer and replication.

A plea is waived by going to answer and hearing on the general merits (Miller v. Perks, 63 Ill. App. 140).

Where a plea is accompanied by an answer, it must be put in upon oath. Pleas in bar of matter of fact must be verified (Dunn v. Keegin, 4 Ill. 292).

Pleas may be made (1) to the jurisdiction, (2) to the person of either party, and (3) to the substance of the bill.

(1) *Plea to the jurisdiction:* When the lack of jurisdiction does not appear on the face of the bill, but upon some fact not shown in the bill, a plea is proper. If this defect appeared on the face of the bill, it would be demurrable. Example: If a citizen of Illinois avers himself to be a citizen of New York and

brings suit in the Circuit Court of the United States against another citizen of Illinois, and the real fact that he is a citizen of Illinois does not show on the face of the bill, then a plea setting up the fact that plaintiff is a citizen of Illinois will be necessary to show the court that it has no jurisdiction. A plea to the jurisdiction must state the residence of the party in question (Lester v. Stevens, 29 Ill. 155).

Pleas to the jurisdiction do not deny the right of the complainant in the subject-matter of the suit, or assert that there is any disability on the part of either the complainant or defendant, but assert that that court is not the proper court to take cognizance of the cause (Story's Eq. Pl. Sec. 106).

(2) *Plea to the person:* Where the incapacity of the plaintiff or defendant to sue or be sued is apparent on the face of the bill, the proper mode of objecting is by demurrer; but where it does not thus appear, the objection must be presented by plea. Example: If the bill shows the complainant to be an administrator, when in fact he is not an administrator, a plea is necessary to set up this fact. Pleas to the person do not dispute the jurisdiction of the court, nor the interest or title of the complainant, but assert that the complainant is incapacitated to sue, or that the defendant is not the person who ought to be sued (Story's Eq. Pl. Sec. 706). If want of indispensible parties is pleaded, the plea must show who are such parties (Robinson v. Smith, 3 Paige 222).

(3) *Pleas to the substance of the bill:*

(a) *Plea denying the plaintiff's right to sue;* as, for instance, denying that he is the heir or the devisee or a purchaser.

(b) *Plea interposing the statute of frauds, or the statute of limitations, or the laches of the plaintiff.* (*Caution:* Where these objections are apparent on the face of the bill, they must be raised by demurrer instead of by plea, unless, of course, they are raised in an answer).

(c) *Plea of payment or of release,* or *plea of any other defense in the nature of confession or avoidance.*

(d) *Plea setting up that defendant is a bona fide purchaser for value, without notice of plaintiff's claim.*

The main purpose of the plea is to save the delay and expense of going into the case at large when some ground exists which, when it is brought to the attention of the court, will result in the abatement of the pending suit or bar recovery therein.

ANSWER.

The third mode of defense to a bill is by answer. If the defendant does not demur or put in a plea, or if his demurrer or plea has been overruled, he must answer, unless he files a disclaimer. An answer answers each allegation of the bill or the part of the bill covered by it, either admitting the allegation or denying it, or asserting ignorance of and disbelief in the truth of the allegation, and therefore denying the allegation and calling for proof thereof (Hopkins v. Medley, 97 Ill. 402). The answer may then proceed further to aver special and new defensive facts. Thus an answer is both an answer and a defense (1 Barb. 130; 1 Dan. 487). The defense may consist of mere denial of material allegations in the bill, or it may consist of new facts averred. In the Federal courts however, defendant may omit answering fully, and may set up in his answer any defenses in bar of the suit or to the merits which might be set up by a plea (U. S. Eq. rule 39).

A defendant must answer not only as to facts within his knowledge, but as to those ascertainable from books and papers in his control (1 Barb. 135). He must answer each material averment directly, unambiguously and without evasion, denying or confessing the real substance each charge clearly (1 Barb. 136; Tourville v. Pierson, 39 Ill. 446).

The 23rd Section of the Illinois Chancery Act requires that "every defendant shall answer fully all the allegations and interrogatories of the complaint, whether an answer on oath is waived or not, except

such as are not required to be answered by reason of exceptions, plea or demurrer thereto allowed" (Hair v. Dailey, 161 Ill. 379).

Section 24 of the Chancery Act is as follows: "When an answer shall be adjudged insufficient, the defendant shall file a further answer, within such time as the court shall direct, and on failure thereof the bill shall be taken as confessed. If such further answer shall be likewise adjudged insufficient, the defendant shall file a supplemental answer, and pay all costs attendant thereon. If that shall be adjudged insufficient, the defendant may be proceeded against for a contempt, and the like proceedings be had thereon to enforce the order of the court as in other cases of contempt."

Complainant should compel a full answer, by filing exceptions for insufficiency, making defendant either admit or deny each allegation, to save unnecessary proof on part of complainant. *Affirmative allegations, whether in a bill or answer, not expressly admitted by the opposite pleading, must be proved* (Cushman v. Bonfield, 139 Ill. 219; Hopkins v. Medley, 97 Ill. 402). An answer so called which "neither admits nor denies any allegation in the bill but calls for strict proof of each allegation" should be stricken from the files upon motion, as being no answer. A defendant who submits to answer, must answer fully (1 Barb. 131).

The 25th Section of the Chancery Act provides: "When the complainant shall require a discovery respecting matters charged in the bill, the discovery shall not be deemed conclusive; but if a replication be filed it may be disproved or contradicted like any other testimony, according to the practice of courts of equity."

Section 26 of the Chancery Act is as follows: "On the coming in of any answer, the complainant may, by leave of court, exhibit and file further interrogatories, to be answered by the defendant within such time as shall be fixed by the court."

In answering, one is not bound to answer allegations which are purely scandalous, impertinent, imma-

terial or irrelevant (Davis v. Collier, 13 Geo. R. 485), nor anything which may subject him to a penalty, forfeiture, or criminal prosecution (Adams v. Porter, 1 Cushing R. 171); but if an answering defendant relies on this objection, he should specifically so state as a ground for refusing the discovery; nor is defendant bound to answer what would involve a breach of professional confidence (Leggett v. Postley, 2 Paige Ch. 599).

An answering defendant must set forth the nature of his defense, and cannot take advantage of matters of defense shown by the evidence, if they are not set up in the answer (1 Barb. 137; Jewett v. Sweet, 178 Ill. 96). If he wishes to introduce proof of fraud on the part of the complainant, he should set forth the circumstances in his answer (Fitzpatrick v. Beatty, 1 Gilm. 454), as no presumption exists in favor of an answer any more than in favor of other pleadings (Mahr v. O'Hara, 9 Ill. 424). If his defense is usury, he must allege the facts particularly instead of in general terms (Mosier v. Norton, 83 Ill. 519). Allegations in an answer and proof introduced by the defendant must agree to render the defense available (Dowden v. Wilson, 108 Ill. 257).

No affirmative relief will be granted to a defendant upon an answer. To get relief, he must file his cross-bill (Ashmore v. Hawkins, 145 Ill. 447). However, in cases where the maxim that he who seeks equity must do equity can be applied, the court may, require the complainant to do equity as a condition to relief without a cross-bill (King v. Cooper, 134 Ill. 183; and see "Cross-bills," ante).

In Illinois, in foreclosure suits, defendants claiming liens against the premises in their answers, whether such liens are junior mortgage liens, or judgment liens, or otherwise, are entitled without filing a cross-bill to have the court determine the existence and priority of such liens and to order the premises sold upon complainant's bill, and the proceeds of sale to be distributed according to the priority of the liens (Gardner v. Cohn, 191 Ill. p. 553). But if a junior lienor desires

relief beyond sharing in the surplus proceeds of sale, such as a decree ordering a sale also for the junior lienor's debt, unless it is paid by a short day named, a cross-bill is necessary to support such a decree (Campbell v. Benjamin, 69 Ill. 244).

The defendant may in the answer suggest that the bill is defective for want of parties, and by proper averment state the names of such parties and their relation to the case (U. S. Eq. Rule 52).

If the defendant does not, by plea or answer, object to the bill as defective for want of parties, the objection will not be allowed to prevail at the hearing of the cause, if the court can grant a decree saving the rights of the absent parties (U. S. Eq. Rule 53; Bank v. Seton, 1 Pet. 299; Story v. Livingston, 13 Pet. 359; Keller v. Ashford, 133 U. S. 610).

If the bill does not waive an answer under oath, the answer must be sworn to (U. S. Eq. Rule 59).

Section 20 of the Illinois Chancery Act is as follows: "When a bill, supplemental bill, bill of review, bill of revivor, or cross-bill shall be filed in any court of chancery other than for discovery only, the complainant may waive the necessity of answer being made on the oath of the defendant, defendants, or either of them; in such case, the answer may be made without oath, and shall have no other or greater force as evidence than the bill."

Section 21 of the Chancery Act provides: "Every answer shall be verified by an oath or affirmation, except as provided in the foregoing section."

Where the oath is not waived, the answer is evidence only so far as it is responsive to the bill, and not as to new matters alleged in avoidance (Cummins v. Cummins, 15 Ill. 33).

Where the answer under oath is required, its allegations can be overcome only by the evidence of two witnesses, or by the testimony of one witness and circumstances equal to that of another witness (Swift v. School Trustees, 14 Ill. 493); or the complainant may prove it false by evidence equal to that of one witness, and in addition thereto by a preponderance of evidence

sufficient to sustain the bill if the oath had been waived (Mey v. Gullman, 105 Ill. 272).

When an oath is waived, a sworn answer will have no force as evidence, and will be considered merely as a pleading (Walwork v. Derby, 40 Ill. 527).

Admissions in an answer are conclusive, and evidence to establish the facts admitted is unnecessary (Gruenberg v. Smith, 58 Ill. App. 281), and evidence to disprove them will not be considered (Deimal v. Brown, 136 Ill. 586); and this whether the answer be sworn to or not (Loughridge v. Insurance Co., 180 Ill. 267). If an admission has been made in an answer by mistake, the court will relieve the party making it from its effect (Maher v. Bull, 39 Ill. 531); or he may file a supplemental answer correcting the mistake (Hughes v. Bloomer, 9 Paige Ch. R. 269).

Testing the legal sufficiency of an answer: Exceptions to the answer do not perform the office of a demurrer in presenting the question whether the facts averred in the answer constitute a defense to the case made in the bill; and as it is not permissible to file a demurrer to an answer, if it is desired to submit the case on the questions of law arising on the answer, *the only method of testing the legal sufficiency of an answer is by setting down the case for hearing on bill and answer* (Banks v. Manchester, 128 U. S. 244).

In such case, the matters well pleaded in the answer are deemed to be true as matters of fact, whether answer under oath is waived or not (Fletcher Eq. Pr. 697; Chambers v. Rowe, 36 Ill. 171, ignored by later Illinois decisions) and the case is heard upon the allegations of fact in the bill contained, and not denied in the answer, taken in connection with the facts averred in the answer (U. S. Eq. Rule 41; Leeds v. Insurance Co., 2 Wheaton, 380; Banks v. Manchester, 128 U. S. 244; Derby v. Gage, 38 Ill. 27; Roach v. Glos, 181 Ill. 440; 16 Cyc. 382).

In such case no allegation made in the bill, although put in under oath, will be considered as evidence if denied; and all the material averments contained in the answer, although not put in under oath, are held to be

true. In short, the complainant must rely wholly upon those allegations in the bill which the defendant by his answer has admitted; and those admissions are to be taken with all the reservations and explanations contained in the answer. The allegations in the bill admitted by the answer must be sufficient, after being emasculated by the explanatory matter contained in the answer, to entitle the complainant to the relief prayed for, or he will fail in his suit. The case must be clear and strong, therefore, which will justify the complainant in going to a hearing on the bill and answer (Thomp. 141; Contee v. Dawson, 2 Bland 264).

Exceptions to answer: An answer may be excepted to for insufficiency or for scandal or impertinence. Exceptions for insufficiency will be allowed where material allegations or interrogatories in the bill are not fully answered (Stafford v. Brown, 4 Paige 88; Glos v. Dietrich, 227 Ill. 581), or where the answer sets up questions of law instead of facts (Craig v. The People, 47 Ill. 487). Exceptions for impertinence or scandal must point out the passage objected to. Exceptions must be filed before filing replication (Coleman v. Lynde, 4 Rand, 454). Even if answer under oath be waived, answers must be full and direct, or exceptions will lie. (Hair v. Dailey, 161 Ill. 379). Exceptions for insufficiency or failure to answer certain allegations of the bill should not be confused with testing the legal sufficiency of the answer as a defense.

In Illinois the denial of execution or assignment of instruments should be sworn to in the answer: (Sec. 33, Ill. Stat. on Practice). "No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or which is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit; and if plaintiff shall file his affidavit denying the execution or assignment of such instrument: PROVIDED, if the party making such denial be not the party alleged to have

executed or assigned such instrument, the denial may be made on the information and belief of such party'' (Dean v. Ford, 180 Ill. 309).

Waiving answer: Going to a trial or hearing without defaulting defendant for want of answer, or without getting a rule on him to answer, waives the answer (Jackson v. Sackett, 146 Ill. 646).

CHART OF DEFENSES IN EQUITY.

Demurrer.	For the sake of argument, grants all the allegations of the bill, that are well pleaded, to be true, but insists that complainant is not, by the case stated, entitled to relief prayed for. It raises questions of law.	GENERAL DEMURRER: Asserting that there is no equity in the bill, without stating the particular reasons why. SPECIAL DEMURRER: Pointing out the particular defect in the bill.
Plea.	Raises a single issue of fact as a complete defense to the bill, either by denying a main fact of the bill or by bringing in a new fact in the plea which will bar the suit. It raises a question of fact	PLEAS IN ABATEMENT: (a) Pleas to the jurisdiction. (b) Pleas to the person of the complainant or the defendant. PLEAS IN BAR: (a) Pleas founded upon some bar created by statute. (b) Pleas founded upon matters of record. (c) Pleas founded on matters of fact.
Answer.	Used when defendant desires to meet all the facts alleged in the bill. It may raise questions of fact, or of law, or both.	Must answer each allegation of the bill: By admitting; by denying; by asserting ignorance of and disbelief in the allegation and calling for proof thereof. Must set forth nature of defense.
Disclaimer.	Disclaiming all interest in the subject-matter of the suit.	

DISCLAIMER.

A disclaimer is a pleading wherein the defendant states that he has no interest in or claim to the subject-matter of the demand made by the complainant. He cannot by a disclaimer deprive the complainant from getting an answer from him, unless it is clear that he ought not after such disclaimer to be retained as a party (Ellsworth v. Curtis, 10 Paige Ch. R. 105). A disclaimer must be full and explicit and be accompanied by an answer denying the facts deemed necessary to be denied (Worthington v. Lee, 2 Bland, 678).

REPLICATION.

A replication is complainant's response to defendant's answer. It reasserts the truth and sufficiency of the bill and denies the truth and sufficiency of the answer (1 Barb. 249).

An answer is taken as true unless challenged by replication (Kingman v. Mowry, 182 Ill. 260). The complainant, not having replied, can offer no proof (16 Cyc. 383). But a replication is waived if the parties go to trial and proofs without it (Jones v. Neely, 72 Ill. 449). Upon an amended answer, or upon a further answer to an amended bill, a replication should be filed (Erissman v. Erissman, 25 Ill. 136).

If the complainant neither excepts to the answer, nor amends his bill to meet new facts in the answer, nor goes to a hearing upon bill and answer, he files his replication. This puts in issue all the facts set forth in the bill and not admitted in the answer. By statute in Illinois, the replication must be general, but with a like advantage as if special. Special replications admitting part of the answer and denying the rest, or setting up new facts in reply to new facts in the answer—have become obsolete. Such new facts are now set up by amendment to the bill (White v. Morrison, 11 Ill. 361; U. S. Eq. Rule 45), unless they have been anticipated in the charging part or stating part of the bill (see, "charging part" of bill, ante).

The Illinois Chancery Act (sec. 28) provides that the replication shall be filed "in four days after the complainant or his attorney shall be served with notice of answer filed." If he does not so file the replication after such notice, the cause may proceed to a hearing on bill and answer; in which case the answer shall be taken as true, and no proofs will be admitted except matters of record (Ill. Chancery Act, sec. 29). This statute affirms complainant's right as above set forth to test the legal sufficiency of the answer by omitting to file replication, and also confers upon defendant the right to force complainant to go to a hearing upon bill and answer for failing to file replication within the four days. However if defendants treat the cause as if at issue and join in taking evidence without objection, they will thereby waive the statute (Marple v. Scott, 41 Ill. 50).

When the replication has been filed, the pleadings are closed, the cause is at issue, and the time for taking testimony has arrived.

AMENDMENTS.

Generally, defects in the form of the bill, in the nonjoinder or misjoinder of parties, in the statement of improper matter, or in the omission to state some material or pertinent matter, are matters to be remedied by filing an amendment.

Also if, to meet new defensive averments of fact in the answer, it becomes necessary to reply with matters existing when the bill was filed, but which are not contained in the original bill, the same should be set forth by way of amendment. In the old chancery practice, a *special replication* was used for this purpose. But special replications are obsolete. The Illinois Statute, Chancery, section 28, providing that "replications shall be general, with the like advantage as if special," would seem to make it unnecessary to meet new matter in the answer by an amendment to the bill. It is the apparent design of the statute, as it is the tendency of modern chancery practice, to abolish special

replications and lessen the number of pleadings; and it would seem like nullifying the statute if a special replication is still filed in the guise of an amendment to the bill. But such amendments are permitted and encouraged under Illinois decisions (McArtee v. Egart, 13 Ill. 242; Commissioners v. Debor, 43 Ill. App. 25; Harding v. Durand, 138 Ill. 515). U. S. Equity Rule 45, forbids special replications but permits amendments made necessary by the answer.

Leave to amend the bill at the hearing for decree is granted in furtherance of justice if the proofs show that complainant is entitled to relief, but there appears need of the addition of a party, or of more precise averments of facts, or of an amendment of the prayer (Neale v. Neale, 9 Wall. 1; The Tremolo Patent, 23 Wall. 518; Hardin v. Boyd, 113 U. S. 756; Graffam v. Burgess, 117 U. S. 180; Richmond v. Irons, 121 U. S. 27; Chicago, etc., Ry. Co. v. Chicago Nat. Bank, 134 U. S. 276; Gormley v. Bunyan, 138 U. S. 623).

The answer may be amended as a matter of course in a matter of form, or as to filling blanks, correcting dates, or by reference to a document or other small matter, and be resworn to, at any time before a replication thereto is filed or the cause is set down for hearing upon bill and answer (U. S. Eq. Rule 60).

In the United States courts, after replication is filed or the cause is set down for hearing on bill and answer, no material amendment can be made, except upon leave granted by the court or judge, after due notice of the application therefor given to the complainant (U. S. Eq. Rules 28, 29, 60).

Amendment by supplemental bill. When suit becomes defective by the happening of some event after the filing of the bill, affecting the interest of the parties or the subject-matter of the suit, or if through newly discovered evidence, it becomes apparent that some new party should be brought in or some new fact should be alleged, the defect may be cured by filing a supplemental bill. In the United States Courts, application for leave to file such a bill should be made to a judge upon a rule day, notice being given to the

adversary party. If leave is granted and the supplemental bill is filed, the defendant must demur, plead or answer to the same on the next succeeding rule day, unless some other time is assigned by the judge. If new parties are brought in, a subpœna must be issued and served on them. (U. S. Eq. Rule 57.)

The statutes of the different States are liberal in permitting amendments to pleadings and are somewhat similar to those in Illinois. We will discuss more particularly those of Illinois.

(Sec. 39, Ill. Stat. Practice): "At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense. The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action."

Continuance on Amendment (Sec. 42, Ill. Stat. Practice): "No amendment shall be cause for continuance unless the party affected thereby, or his agent or attorney, shall make affidavit that in consequence thereof he is unprepared to proceed to or with the trial of the cause at that term; and if the cause thereof is on account of material evidence which the party cannot produce, unless time be given him for the purpose, stating in such affidavit what particular fact or facts the party expects to prove by such evidence, and that he verily believes that if the cause is continued he will be able to procure the same by the next term of the court: PROVIDED, that if the application for continuance is on account of the absence of evidence, and the court is satisfied that such evidence would not be material on the trial of the cause, or if the other party will admit the affidavit in evidence subject to the effect

given to affidavits for a continuance in this chapter, the cause shall not be continued."

Besides the above provisions concerning amendment, there is another provision almost similar in the Illinois Statutes entitled "Chancery," which will be found below.

Amendments to conform to proofs taken: The statute and the decisions of Illinois make it proper for the court to permit amendments to conform to proofs already taken. Note the following decision, rendered in the case of Gordon et al. v. Reynolds, 114 Ill. 123:

"Under the third objection, it is insisted the court erred in allowing appellee to amend his original bill after the evidence was substantially all heard, so that the allegations and proof might correspond. This was not only not error, but is a practice highly commendable, and absolutely necessary in a great many cases to a proper administration of justice. We fully recognize the rule contended for by counsel for appellants, that a complainant cannot make one case by his pleadings and another by his evidence, and succeed. To obviate this, he should do as was done in this case—obtain leave to and amend his pleadings so as to fit the case shown by the evidence. It is not material when such amendments are made, except as to the terms the court, in its discretion, might see proper to impose as a condition to permitting the amendment. Usually these amendments are made after the evidence is all in, and the variance is brought out in the course of the argument, and it sometimes occurs that several amendments of this nature and for this purpose are made at different times during the final argument of the case. These amendments are purely discretionary, and ordinarily, in the absence of evidence showing an abuse of a reasonable discretion, are not subject to review." (Chapter 22, Chancery, Sec. 37; Jefferson County v. Ferguson et al., 13 Ill. 35; Moshier v. Knox College, 32 Ill. 163; Mason v. Baird, 33 Ill. 205; Marble v. Bonhotel, 35 Ill. 248; Hewitt et al. v. Dement et al., 57 Ill. 502; Lewis et al. v. Lanphere, 79 Ill. 189; Booth et al. v. Wiley et al., 102 Ill. 99; Scott et al. v. Harris et al., 113 Ill. 457; Gordon et al. v. Reynolds, 114 Ill. 123; American Bible Society et al. v. Price, 115 Ill. 635; Koch et al. v. Roth, 150 Ill. 217; Cooper v. Gum, 152 Ill.

474; Wolverton v. Taylor & Co., 157 Ill. 494; So. Chicago Brew. Co. v. Taylor, 205 Ill. 142).

Where a bill is amended to conform to the proofs already taken, and treated as if in issue, an amended answer is proper, not only for the purpose of formally and regularly presenting the new issue to the court, but for the further purpose of permitting the defendant in his amended answer to allege defenses (So. Chicago Brew. Co. v. Taylor, 205 Ill. 142). If defendant treated complainant's proof as if in issue the court in granting leave will probably limit his defenses to such as may be necessary to make defendant's answer conform to proofs already taken in his favor. The doctrine that allegations and proofs must correspond applies as well to the answer as to the bill (Dowden v. Wilson, 108 Ill. 257).

In Illinois, upon an amendment to conform to proofs, being filed, the filing of an answer making an entirely new defense will not avail to set aside the statute and *gain a continuance* for further evidence or preparation for the defendants, without the statutory showing. The question of a continuance upon amendment is governed by statute (Koch v. Roth, 150 Ill. 217; Beneppe v. Meier, 75 Ill. App. 566). Chapter 22, entitled "Chancery," Sec. 37, adopted by the Revision of 1874 and continued the same to this day, is as follows:

Extending time to plead, amendments: "The court may extend the time for answering, replying, pleading, demurring, or joining in demurrer; and may permit the parties to amend their bills, pleas, answers and replications, on such terms as the court may deem proper, so that neither party be surprised nor unreasonably delayed thereby; and no amendment shall be cause for a continuance unless the party to be affected thereby, or his agent or attorney, *shall make affidavit* that, in consequence thereof, he is unprepared to proceed to trial of the cause at that term, and that he verily believes that if the cause is continued such party will be able to make such preparations." (See also Sec. 42 of Ill. Practice Act).

The Illinois Revised Statutes of 1845 and until the

Revision of 1874 did not contain any provision regulating continuances upon amendments and thus continuances depended upon the discretion of the court until the Revision of 1874.

Where the affidavits in support of the motion for a continuance do not show diligence and the essential facts required as reasons for a continuance, the motion will be refused (Hahn v. Huber, 83 Ill. 243).

If defendant (upon complainant's amendment to conform to proofs treated as if in issue), desires to amend his answer and to put in an entirely new defense, he should obtain leave of court and submit to the court's discretion to permit the amendment. It cannot be slipped in under the guise of answering complainant's amendment.

When evidence upon a point not in issue is offered, if the opposing party desires to stop such evidence and force his adversary to then and there amend his pleadings before putting it in, he should make that specific objection. The court upon application may, of course, allow the required amendment, but must then give the objecting party such extensions of time (upon the filing of proper affidavit) as may be necessary to allow all parties ample opportunity to meet the issues (American Bible Society v. Price, 115 Ill. 635; Moshier v. Knox College, 32 Ill. 164). A party thus refusing to treat as in issue, what is not as yet in issue, is unhampered in his amended answer. It may contain new defenses.

In Illinois, when an amendment to the bill brings in a new issue, it is proper for the defendant to file an amended answer, so as regularly to present the new issue to the court. "As a general rule, where complainant amends his bill, the defendant in the case should answer the amended bill, or a rule should be laid upon him to answer" (Harms v. Jacobs, 160 Ill. 593, citing Gage v. Brown, 125 Ill. 522; Adams v. Gill, 158 Ill. 192; Bauer Grocer Company v. Zelle, 172 Ill. 412).

Applications to amend in equity are be addressed to the discretion of the court (McArtee v. Engart, 13

Ill. 242; Campbell v. Powers, 139 Ill. 128). An amendment filed without leave is properly stricken from the files (Field v. Golconda, 81 Ill. App. 165; Ill. Stat. Amendment, Sec. 8).

The regular and proper course upon a material amendment to the bill is for the court to set all defaults aside; but whether there is such an order or not, filing an amendment to a bill of itself sets default orders aside (So. Chicago Brew. Co. v. Taylor, 205 Ill. 142; Lyndon v. Lyndon, 69 Ill. 43; Gibson v. Rees, 50 Ill. 383).

MASTERS IN CHANCERY.

A master in chancery is an officer of the court of chancery and acts as an assistant to the chancellors. His duties and powers are governed by statutes, rules of court, and the general practice of courts of chancery. His duties, though often judicial in character, are held to be ministerial duties and not judicial (Ennesser v. Hudek, 169 Ill. 494; Hards v. Burton, 79 Ill. 504). The matters referred to a master by the chancellors, vary. He may be ordered to do a particular ministerial act; he may be ordered to take the testimony in a case and report the same; he may be ordered to take the testimony in a case and report the same, together with his conclusions thereon; in fact, there is hardly any matter in a chancery cause which the chancellor may not refer to a master in chancery. In Illinois, the statute provides that masters may take depositions, both in law and in equity; may administer oaths; have power to compel the attendance of witnesses; take acknowledgments to deeds and other instruments of writing; in the absence of the judge, order the issuing of writs of *habeas corpus*, *ne exeat*, and injunction; and perform all other duties which, according to the laws of this State and the practice of the courts of chancery, appertain to the office. The statute also provides that upon default or upon issue being joined in the case, the cause may be referred to a master in chancery *to take the testimony and report the same,* or *to*

take the testimony and report the same, together with his conclusions. By a rule of the Cook County Chancery Courts, the master is authorized to rule on the admissibility of evidence.

Except where the statutes or the chancery rules of court provide otherwise, a master can act only upon an *order of reference* entered by the court (Preston v. Hodgen, 50 Ill. 56).

The order of reference to a master should always clearly show what issue or matter is referred to him, whether the issues at large or only some special matter or matters connected therewith.

References to a master are discretionary with the court (Land Co. v. Peck, 112 Ill. 431; Harding v. Harding, 180 Ill. 481), except when the suit involves a complicated accounting. In the latter case a reference is necessary (Moss v. McCall, 75 Ill. 190; Mosler v. Norton, 83 Ill. 519); and a reference is also necessary where the testimony is voluminous and conflicting (Beale v. Beale, 116 Ill. 292); but not so where the amount due under a contract is a simple matter (Cusack v. Budasz, 187 Ill. 392); nor where there is mere computation of payments and interest (Carroll v. Tomlinson, 192 Ill. 398; Belleville v. Citizens' N. Ry. Co., 152 Ill. 189).

Section 38 of the Illinois Statute on evidence, compels a chancery court to receive *oral evidence on the trial, if desired by either party.* This means that if either party desires it, the judge must on the trial receive oral evidence in the same manner as in law cases. Therefore, in Illinois it would seem to be a party's right to have the court hear and determine his cause without the cost of a reference to a master, unless the case involves a complicated accounting or voluminous testimony. (See cases in preceding paragraph.) In the latter case a court must refer the case to a master. It would seem to be an abuse of sound discretion to force upon an unwilling party, the cost of an unnecessary reference. To avoid a reference with the attendant costs, a party should make and persist in a specific objection to the order of reference upon this ground.

Otherwise such party may be held to have waived his right to an oral hearing, and to have consented to the reference. However, if the cause is referred against his objection, such objecting party should not refuse to put in his proofs before the master, because it has been decided that upon a reference all proofs must be put in before the master (Cox v. Pierce, 120 Ill. 556; Gould v. Banking Co., 36 Ill. App. 390), but he should persist in his objection before the master and again before the court, upon the coming in of the master's report, upon the ground that the cost of the reference was unnecessary. This ground of objection will, of course, be obviated if the party seeking and obtaining the reference bears the entire cost of the reference.

The Cook County, Illinois, Chancery rules provide that no reference shall be allowed in default divorce cases except as to questions of alimony and of property.

Duty and Power of Master in U. S. Courts: The master has power to regulate all the proceedings in every hearing before him upon references; and he has full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the Acts of Congress, or otherwise, as provided in the Equity rules; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him which he may deem necessary and proper to the justice and merits thereof and the rights of the parties (U. S. Eq. Rule 77). The orderly and accepted procedure is to present all objections and questions arising before the master in the form of ex-

ceptions to his report (Lill v. Clark, 20 Fed. 455; Bate Refrig. Co. v. Gillette, 28 Fed. 673). Witnesses living within the district may, upon notice to the opposite party, be subpœnaed to testify before the master (U. S. Eq. Rule 78). The admission and rejection of evidence rests within the sound discretion of the master (U. S. Eq. Rule 77, 1884; Wooster v. Gumbirner, 20 Fed. 167). The court cannot refer all the issues to be passed upon by the master except upon consent of the parties (Kimberly v. Arms, 129 U. S. 524; Davis v. Schwartz, 155 U. S. 631).

PRODUCTION OF BOOKS AND WRITINGS BEFORE MASTER.

If the order of reference contains a direction that the parties produce before the master, upon oath, all books or writings in their possession or power relating to the matter of the reference, and that the parties be examined upon interrogatories, as the master shall direct, the words "as the master shall direct" apply to both branches of the direction, namely, to the production of deeds and to the examination on interrogatories; and they are considered important as vesting the master with discretion upon the subject of production (1 Barber's Ch. Pr. 480). Under our practice, it is best for the master to order the production of books and papers by *subpœna duces tecum*, inserting the words: "And then and there bring with you and produce before said master all deeds, books, papers and writings in your custody or power relating to the matter of reference." (*In re* O'Toole Estate, 1 Tuck. 39 N. Y.) Or the production may be enforced by taking out and serving a warrant or notice signed by the master and requiring the production of the certain books and writings (1 Barber's Ch. Pr. 481).

Although the language of the order of reference is general that the parties produce all books, papers, etc., the master is to exercise his discretion in determining what books and papers are necessary to be produced. The discretion of the master is limited by the rules which guide the court in compelling a discovery of

books and documents in other cases (1 Barber's Ch. Pr. 481; Lester v. People, 150 Ill. 408).

The master has power to receive evidence, but cannot grant leave to withdraw exhibits upon leaving copies thereof (Bolter v. Kozolwski, 211 Ill. 79). Therefore, the master should exercise caution in impounding books and writings under the name of evidence in a cause.

To obtain an order for the production of papers or books, application is made to the court or master by special motion (1 Barb. 229) and in Illinois upon affidavit that the production of the papers or books is necessary to enable the party making the application to prosecute or defend the suit. Unless a showing is made, upon good and sufficient cause, that the evidence sought, or that the books and papers required to be produced, contain evidence pertinent to the issue on behalf of the party applying therefor, the application should be denied (Lester v. People, 150 Ill. 408-418; Bentley v. People, 104 Ill. App. 353; Wynn v. Taylor, 109 Ill. App. 603; Ill. Stat. on Evidence, Sec. 9).

REFERENCE TO STATE ACCOUNT.

Upon a reference to a master to take and state the accounts between parties, the court should first find and declare the rights of the parties and the rule to be adopted in stating the account (Moffett v. Hanner, 154 Ill 649; Mosier v. Norton, 83 Ill. 519); and the examination should be according to such finding and such rule (Remsen v. Remsen, 2 Johns. Ch. 495). Each party should bring in his whole account, for the whole period for which he is accountable, in the form of debtor and creditor (Cook County Chancery rules). The master should then ascertain from the parties or their counsel, by written acknowledgments, what items are agreed to and what items are objected to, and the proper proofs should then be taken (Daniels' Ch. Pr. 1419). In Chicago any party not satisfied with the accounting may examine the accounting party (Cook County Chan. rules).

THE MASTER'S REPORT.

The master's findings and conclusions are embodied in a document called the master's report, which should show the proceedings which have been had under the order of reference, the evidence taken, and the findings of fact and conclusions of law reached by the master, in such form and manner that the court may intelligently act upon such report (Schnadt v. Davis, 185 Ill. 476).

The decree of a court is usually not written by the chancellor, but by one or more of the solicitors of the parties, and is signed by the chancellor after the opposing party has had opportunity to argue his objections thereto. But the parties have little to do with drafting the master's report. In Illinois, the master is compelled to draft his own report (Fitchburg Steam Eng. Co. v. Potter, 211 Ill. 138; Keeley Co. v. Hargreaves, 236 Ill. 332). However, each of the opposing lawyers has the right to draw up and file with the master a written brief and argument stating the formal findings of fact and of law which the master is requested to find, together with a reference to the exhibit or the page of the testimony containing evidence and citing the authority bearing on the finding. This does, in a formal and accurate manner what every oral argument before the master does in an informal manner; and this procedure insures that the master will carefully consider granting or refusing each finding requested. Such requests for specific findings may furnish a guide for later objections to the master's report.

A lawyer's brief may properly contain (1) a request that the master make certain findings of fact, stating the findings substantially alleged in the pleading, and referring to the evidence for and against such findings; also (2) a request that the master find certain conclusions of law, stating them exactly and citing authorities. This brief and argument should be entitled in the cause, and the request for findings should be substantially in the following form:

"On behalf of ....., complainant

(or defendant) in the above entitled cause, we respectfully contend that the pleadings, orders of record, exhibits and evidence in the above entitled cause and referred to herein will justify said master in including in his report, among other findings of fact, the following:

"1. That (here state finding substantially as alleged in the pleading, and after the finding refer to the exhibits or pages of testimony bearing *pro* and *con* on the finding).

"2. That, etc.

"We further respectfully contend and request that the master find the following conclusions of law:

"1. That, etc. (cite case or authority).

"Dated this ..... day of .....,

(Signed) "....,

Solicitor for Complainant
"(or Defendant)."

OBJECTIONS AND EXCEPTIONS TO MASTER'S REPORT.

After the master prepares his report, it is usual for him to notify the parties and fix a day for objections to be filed before him to such report, so as to afford the master opportunity to modify his report if he thinks fit. If, upon a hearing of the objections, the master declines to modify his report, the parties insisting on such objections must file them again in court, under the name "Exceptions to the Master's Report," because the master's findings of fact are conclusive in the absence of exceptions so filed. (Marble v. Thomas, 178 Ill. 540). If objections are not filed before the master, exceptions will not be considered by the court (Jewell v. Paper Co., 101 Ill. 57; Pennell v. Insurance Co., 73 Ill. 303).

A decree disposing of objections to the master's report should specify what exceptions were sustained and what overruled, so that the Appellate Court may determine the basis of the decree entered (Prendergast v. McNally, 76 Ill. App. 335).

But no objections are necessary to a master's findings as to matters of law. These will be heard by the

court without the filing of objections or exceptions (2 Dan. 952; Hayes v. Hammond, 162 Ill. 135). It serves a very useful purpose, however, to file before the master formal objections to his conclusions of law, citing the authorities. It may induce him to conclude differently.

Objections should be entitled in the cause and should be called:

"OBJECTIONS TO MASTER'S REPORT."

and be substantially in the following form:

"Now comes ....., complainant (or defendant), and objects to the master's first draft of his report in the above entitled cause, dated the ..... day of ....., ...

"1. Because the master has found that (state the finding of fact); whereas said master should have found that (state the finding of fact as objector thinks it should be found). One ground of objection, among others, being that (said master's finding is contrary to the weight of evidence and contrary to confessions under the pleading; or state other objection). See exhibit B; also, see testimony, pp. 127, 236, 250.

"2. Also because the master has omitted or refused to find that (here state the finding of fact which was omitted by the master, and which the party objecting deems it essential to his suit for the master to have found). The ground of objection among others, being that (the finding is material to complainant's case, and is established by the evidence). See testimony pp. 17, 24.

"3. Etc.

"Wherefore, said objector prays the master to modify and amend the said draft of his report in accordance with the objections above stated, and in accordance with the exhibits and evidence introduced, and the pleadings on file.

"Dated this.....day of.....,

(Signed) ".....

"Solicitor for Complainant
(or Defendant)."

It is important for the objector to complain because

the master omitted certain findings. The objector's attention is naturally absorbed with the findings that appear in the report. In his desire to have these agree with his view, he is likely to forget proper findings omitted from the report. A carefully drawn master's report should contain an express affirmative or negative finding as to each material fact pleaded in the bill or answer, or a finding that a certain averment is not supported by any evidence nor confessed in any pleading. After each finding should be a reference to the pages or exhibits containing testimony *pro* and *con* bearing on the finding. Thus the report vindicates itself before the court. (McMannomy v. Walker, 63 Ill. App. 278; Green v. Bishop, 1 Clifford 186).

An objection that the findings and each of them are not warranted by the evidence is not sufficiently specific (Waska v. Klaisner, 43 Ill. App. 611). It seems in Illinois objections need not recite or point out the evidence relied upon, but only need point out distinctly the *findings* and *conclusions* sought to be reversed (Hayes v. Hammond, 162 Ill. 133; McMannomy v. Walker, 167 Ill. 497). Good practice requires an objector not only to point out the finding objected to, but also to state the ground of the objection (1 Barb. 551; 2 Dan. 957; 2 Bates Fed. Eq. 821; Hurd v. Goodrich, 59 Ill. 455; Harding v. Handy, 11 Wheaton 103; Story v. Livingston, 13 Peters 359; Emerson v. Atwater, 12 Mich. 314; Singer v. Steele, 125 Ill. 429). It is also good practice for the objector to cite the page of testimony or the number of the exhibit bearing on the subject-matter of the objection or exception.

A master's findings, approved by the court, will not be disturbed by the Supreme Court when not manifestly and clearly against the weight of the evidence (Miltimore v. Ferry, 171 Ill. 219); but they are not entitled in an appellate court to the same weight as the verdict of a jury at law (Ennesor v. Hudek, 169 Ill. 494), nor will they have the same weight as the findings of the chancellor when the witnesses have been heard in open court (Brueggestradt v. Ludwig, 184 Ill. 24).

There is no rule of practice which forbids the court making additional findings upon the coming in of the master's report besides those set forth in the report, if the evidence accompanying the report warrants and supports such additional findings. The court is not confined, in its review of the evidence, to the mere question of ascertaining whether the exceptions filed to the report, or any of them, should be sustained. When the master's report is returned into court, the party objecting to it may file exceptions, upon the hearing of which the whole evidence is brought forward, and passes in review before the court (McClay, Admr. v. Norris, 4 Gilm. 370; Wolfe v. Bradberry, 140 Ill. 582).

SPECIAL COMMISSIONERS.

The phrase "special commissioner" means a person or officer holding a "special commission" in the shape of *letters patent* issued by a Government, or a warrant contained in *an order of court;* which letters or order of court define the powers or duties of the person or officer so specially commissioned (Cyc. Vol. 8, p. 334 and Vol. 11, p. 622; also see Smith's Chancery Prac. on "Commissioners to Take Testimony"). In chancery practice, special commissioners are persons or officers specially appointed under a dedimus or commission to take depositions or to examine witnesses. (2 Dan. 466). Special commissioners, with the duties of a master in chancery, are unknown in chancery proceedings except as set up by special statutes.

In Cook County, Illinois, even *in cases other than cases under the Lost or Destroyed Records Act,* the regularly appointed masters in chancery, who possess experience and have given the statutory bond for the faithful discharge of their duties as masters, are sometimes superseded by the appointment of special commissioners to do the work of masters. Such practice is unjust to the regular masters, who are obliged, at their own expense, to furnish suitable accommodations for hearings, etc., and is a violation of Section 5 of the

Illinois Statutes relating to the appointment of special masters.

Section 5 of the Illinois statute on masters in chancery, passed in 1872, is as follows:

"Whenever it shall happen that there is no master in chancery in any county, or when such master shall be of counsel or of kin to either party interested, or otherwise disqualified or unable to act in any suit or matter, the court may appoint a special master to perform the duties of the office in all things concerning such suit or matter."

Section 20 of the Illinois Statutes entitled, "Lost or Destroyed Records," enacted in 1872, is as follows:

"The judges of courts having chancery jurisdiction in such county shall have power to appoint as many special commissioners, from time to time, as they may deem necessary to carry out the provisions of this act, in addition to the masters in chancery of said courts, who shall be *ex officio,* such special commissioners, to take evidence and report all such petitions as may be referred to them. The fees of all masters in chancery, commissioners, clerks, sheriffs, and all officers and employes, for services under this act, shall not, in any case, exceed two-thirds of the fees now or hereafter provided by law for the same services."

Section 39 of the Illinois Chancery Statute, passed in 1872, is as follows:

"The court may, upon default, or upon issue being joined, refer the cause to a master in chancery, or special commissioner, to take and report evidence, with or without his conclusions thereupon."

No person with the duties of a master should be specially appointed in any suit or matter except in accordance with Section 5 of the Illinois Statutes relating to masters in chancery. A special commissioner, with the duties of a master, is nothing else than a special master.

Section 39 of the Illinois Chancery Practice Act must be read in connection with Section 20 of the Lost and Destroyed Records Act and with Section 5 of the Master in Chancery Act. It then becomes plain that the court has no power to appoint *special commissioners with the duties of a master in chancery,* except

to perform duties under the Lost and Destroyed Records Act. This section plainly means that a case may be referred to a master in chancery or (*if it is a burnt record case*) to a special commissioner.

If a special commissioner *with the duties of a master in chancery* were known to chancery practice, it would not be necessary to carefully set up such an officer in the Lost and Destroyed Records Act. Furthermore, if a court of chancery, regardless of the Destroyed Records Act, has the power to appoint special commissioners *with the duties of a master in chancery,* then section five in the Master in Chancery Act clearly limiting the appointment of special masters, is futile. This section is evaded every time a court, except in proceedings under the Burnt Records Act, appoints a "special master" under the name of a "special commissioner."

The case of Davis v. Davis, 30 Ill. 180, approving the appointment of special masters, was decided in 1863, before the enactment of the statute of 1872 restricting the appointment of special masters. The case of McIntyre v. The People, 227 Ill. 30, merely holds that a notary in that case might have had more power in subpœnaing witnesses if he had been appointed a *special master* to take the evidence under Section 5 of Chapter 90. The writer knows of no Illinois case that justifies the violation of Section 5 of the Master in Chancery Act in the manner above discussed.

Illinois practitioners who persist in ignoring the statutes by having causes, other than Destroyed Record causes, referred to a special commissioner "to take and report the evidence, with his conclusions thereon," should at least be careful to have the court in its order grant to such special appointee all the important powers needed by a master in chancery. Being unknown to chancery practice, such appointee can have only the powers specially granted in the court's order. It is very doubtful otherwise that he can cause the parties or their witnesses to appear before him, or that he can subpœna witnesses, or that he can rule parties to close their proofs by a certain day, or that he can rule

on the evidence according to the rules of court governing masters in chancery, or that he can charge any fees, etc.

There is only one safe practice, which is to refer Destroyed Record causes to a special commissioner or to a regular master in chancery, and to refer all other referable causes to a regular master, or to a special master appointed under circumstances set forth in Section 5 of the statute.

EXAMINERS.

An examiner is an officer of a chancery court. His duties are to receive interrogatories for examination and cross-examination of witnesses, and to examine and cross-examine such witnesses; to reduce the depositions of such witnesses to writing, and to read over such depositions to the witnesses previously to their signing the same. He is authorized to administer the usual oaths and to take the usual affirmations of witnesses. By statutes of the various states and by rules of practice in the various courts, the duties of the examiners and of special commissioners are now performed also by notaries public, justices of the peace, masters in chancery and judges of courts. In Illinois examiners are appointed by special commission and are called special commissioners." By statute also any notary, justice of the peace, and certain other officers, may act as examiners to take testimony upon the proper statutory notice to the parties.

EVIDENCE IN CHANCERY.

Before the time for introducing evidence, each party should determine what facts have been admitted and what have been denied, by (1) the pleadings, by (2) defaults, by (3) agreements or stipulations in writing.

1. Admissions by the pleadings may be *implied* by such statements of fact as the parties are presumed to have admitted under the forms of pleading. For example, filing a plea grants the truth of all the matters

well pleaded in the bill and not traversed by the plea (2 Dan. 396).

Admissions by the pleadings may be *express:* All admissions made by the defendant in his answer may be read in evidence against him, without making the denials contained in the answer evidence in his favor (Smith v. Potter, 3 Wis. 432). Infants are the special wards of chancery courts, and therefore an exception exists in their favor. Even if an infant's guardian *ad litem,* in his answer, should admit certain allegations in the bill, nevertheless, as against such infant, complainant must strictly prove each such material allegation just as if it had been denied by the answer. Neither a default nor a decree *pro confesso* can be entered against an infant (McClay v. Norris, 9 Ill. 370).

The facts positively alleged in the bill of course are admissions, and may be read in evidence by the defendant as admissions made by the complainant. The complainant cannot read his own bill as evidence in his favor, unless the defendant by his answer has admitted expressly or by implication the truth of certain parts of the bill, in which case the complainant may read such portions of his bill *as the admissions of the defendant* (McGowan v. Young, 2 Stewart, 276).

It is not necessary that the defendant should in his answer make a positive admission in order to have it read in evidence against him; it will be sufficient if he alleges that he believes, or is informed and believes, it to be true; unless it is accompanied by some statement which prevents its being considered as an admission (Potter v. Potter, 1 Ves. Sen. 274).

2. By default in appearing or answering, a defendant confesses the entire bill. By default in filing a replication, complainant confesses the truth of the answer, unless the parties proceed to proofs as if replication were filed (Marple v. Scott, 41 Ill. 50).

3. To save delay and expense, parties often stipulate in writing as to certain facts.

Otherwise, all other material allegations, whether in the bill or in defensive pleadings, must be proved by evidence.

TAKING TESTIMONY.

Formerly, all testimony in chancery was taken secretly and reduced to writing upon written interrogatories and cross-interrogatories before an examiner, neither party to the suit being permitted to be present, even by counsel. Neither party was entitled to a copy of the interrogatories prepared by the other for his witnesses. Each party drew up the interrogatories for his own witness, and the witnesses were separately and secretly examined by the examiner, and no part of the testimony was disclosed to either side until publication day. But each party was entitled to a list of his opponent's witnesses, that he might examine them upon cross-interrogatories. But since he neither knew what the direct interrogatories were nor how they had been answered, such cross-examination was unsatisfactory and likely to do his cause more harm than good. Full directions were given the examiners how to proceed. The witness was not permitted to see the interrogatories he was to answer; each one was read over to him and he was required to answer it in full before the next was read. After the testimony was taken it was filed in court, where it remained till publication day; by which is meant the day they were opened for inspection, and each side was furnished with copies. Thus, after the cause was ready for hearing, the counsel for the first time learned what evidence had been introduced (Daniell's Ch. Pr. Chap. XX; Thompson's Eq. Prac.).

This old practice has been modified in United States courts and in those of many of the states, including Illinois. The modern tendency is to allow inspection of interrogatories, and to allow oral examinations by counsel as well as upon written interrogatories propounded by examiners, and to allow all parties and counsel to be present. Even if statutes permit oral evidence in court or before the master, the evidence is preserved in writing (Owen v. Ranstead, 22 Ill. 172). It is still the more usual practice to take the evidence and reduce it to writing prior to the court hearing of

the cause, and before a master, examiner or commissioner.

It is important that students and lawyers understand both the old and the modern method of taking evidence in chancery, in order that equity cases in the different jurisdictions may be intelligently read.

PRESERVING EVIDENCE IN THE RECORD.

In chancery cases, courts of appeal determine questions of fact from the evidence in the record, and they are not bound by the findings of the lower courts (Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171; Blease v. Garlington, 92 U. S. 1). Futhermore, there are no presumptions in favor of the validity of a decree in chancery, as there are in favor of a judgment at law. Therefore, the evidence in a chancery cause should be contained in the record, in order that all testimony introduced will appear for the reviewing court. Even if statutes or rules of court permit oral testimony to be taken on trial in open court, as at law, a stenographer should be hired to reduce it to writing; and the party offering rejected testimony must in the Federal courts endeavor to obtain the court's permission to allow the rejected testimony to go on record, subject to the objection and ruling of the court, not in the form of an "offer," but in the form of question and answer, in order that the reviewing court may consider the evidence in question without remanding the cause for the purpose. Note the following U. S. Supreme Court case:

"While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the

ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions (by examinations before an examiner, whereby, under U. S. Eq. rule 67, the testimony objected to and the objection are included in the deposition, and thus preserved in the record)*, parties, if they prefer to adopt some other mode of presenting their case (such as oral testimony in open court)*, must be careful to see that it conforms in other respects to the established practice of the court'' (Blease v. Garlington, 92 U. S. 1; Massenberg v. Dennison, 107 Fed. 21).

That is to say, the party wishing to rely upon rejected testimony taken orally before the court, must see to it that the court preserves the testimony in question, and the objection and ruling thereto, in writing of record somewhat after the manner of an examiner under U. S. Eq. Rule 67. The courts of Illinois do not follow this strict practice (See objections and rulings upon evidence, below).

In Illinois, as in most other jurisdictions, to sustain a decree in chancery, the evidence upon which it is based must, in some manner, be preserved in the record (Waugh v. Robbins, 33 Ill. 182). Recitals in the decree serve the purpose of preserving evidence of record since the passage of the Illinois statute permitting oral evidence in chancery causes (Gorman v. Mullins, 172 Ill. 349). If oral evidence was taken and not reduced to writing, or if the judge's certificate of evidence, or the master's report of evidence, or the depositions containing evidence, are lost, and thus not part of the court's record of the cause, the decree will still be deemed to be supported by evidence duly taken, if the decree makes specific findings showing such facts to have been proved as were not admitted by the pleadings (Grob v. Cushman, 45 Ill. 119). But the bare general finding in a decree that ''all the material allegations in the bill are proved and that

*The parentheses are the author's.

the equities of the case are with the complainant" will not sustain a decree granting relief unless such decree be based upon the findings in a verdict of a jury, called to try the facts, or upon the findings in a master's report (Ohman v. Ohman, 233 Ill. 632). Admissions in the pleadings are deemed evidence of record (Atkinson v. Linden Steel Co., 138 Ill. 187). *Pro confesso* decrees need not be supported by evidence of record (Smith v. Trimble, 27 Ill. 152), nor a decree dismissing a bill for want of equity (Jackson v. Sackett, 146 Ill. 646), or otherwise dismissing the bill (Banks v. Baker, 161 Ill. 281).

OBJECTIONS AND RULINGS UPON EVIDENCE.

Examiners, commissioners and notaries taking depositions are not supposed to be qualified, like judges and masters, to pass upon objections to evidence; and, besides, they have no pleadings to show what issues form the case. If these officers were permitted to pass upon evidence, errors of ruling would be too numerous and cause too much inconvenience, especially when depositions are taken at distant places. Hence, the wise practice that all evidence deposed before such officers be received subject to the objections stated, and that the officer taking the deposition be without power to reject or pass judgment upon the admissibility of evidence or to rule upon objections.

If an objection is intended to be insisted upon when the deposition is read to the court at the hearing for decree, or to be insisted upon when later the case is appealed, it should first be made in time to give opportunity for correction, if correction be possible (Millard v. Millard, 221 Ill. 86; Glos. v. Hoban, 212 Ill. 222; 1 Barb. Chan. 287; 13 Cyc. 1009). Objections based on informalities and irregularities in taking proofs should be made by motion to suppress the deposition before the hearing, and if overruled, an exception should be taken; but all more substantial objections may be made at the hearing for decree, either before or after the evidence is read (Swift v. Castle, 23 Ill. 209; Ill. Cent. v. Pancbiango, 227 Ill. 170).

Exceptions need not in chancery be taken or preserved to the rulings upon objections to evidence (Same case) .

To save for review an objection as to the admissibility of evidence the objection should be made and insisted upon successively before the master when evidence is taken, then upon objections to his report, and then upon exceptions to the report before the chancellor (Glos v. Hoban, 212 Ill. 222; Ogden B. & L. Ass. v. Mensch, 196 Ill. 561). In Cook County, Illinois, a party insisting upon an objection as to the admissibility of evidence in cases on hearing before a master, must bring the objection before the chancellor after taking testimony is closed, and before the master has made his report. (See Cook County Rules).

Where evidence is taken in open court, or before a master, the court and master both have authority (Elwood v. Walter, 103 Ill. App. 227; Cook County, Ill. Chan. Rules; U. S. Eq. Rule 77), and should rule upon objections to evidence before the taking of the evidence is closed; the evidence can be allowed to appear on the record even if ruled to be inadmissible. Otherwise lawyers will be misled into relying upon evidence which a reviewing court may rule to be improper under the objection, and which might have been corrected if the lower court or the master had ruled against it. Objections produce little or no impression, but a ruling of the court or master produces caution. The benefit of an objection is that it tends not only to avoid incompetent testimony, but also to give opportunity to offer competent testimony (Millard v. Millard, 221 Ill. 86). Such benefit is lost if no ruling is made. A party may suffer as much if the court or master fails to rule upon objections, as when he suffers by an erroneous ruling. It may be for this reason that in some jurisdictions objections must be called to the attention of the chancellor, and must be specific enough to point out the grounds of incompetency (Hamilton v. S. N. Gold Min. Co., 33 Fed. 562; Freeny v. Freeny, 80 Md. 406). And in some jurisdictions objections are deemed to be waived unless

a ruling is insisted upon (Bunnel v. Stoddard, 4 Fed. Case No. 2135; C. & E. I. R. R. Co. v. Lawrence, 96 Ill. App. 637). But in the federal practice, under the authority of Blease v. Garlington (92 U. S. 1), a judge or a master, though ruling against testimony, should upon request allow the rejected testimony to appear in the record, subject to the objection *and ruling,* for the reviewing court to pass upon. In the federal courts he cannot refuse this right (Fayerweather v. Ritch, 89 Fed. 529).

The federal practice requiring any and all kinds of evidence offered, with the objections and rulings, if any, to appear on the record, is not followed by the states. In Cook County, Illinois, the court rules permit the master to rule upon the admissibiltiy of evidence, and he has power to exclude evidence (Cook County Chan. Rules), but it is considered the better practice for the master to admit evidence subject to the objections stated (Gordon v. Reynolds, 114 Ill. 118; Ellwood v. Walter, 103 Ill. App. 219); and this course should be pursued where there is any doubt about the competency of the evidence. The reviewing court is concerned chiefly *to have the evidence in chancery causes appear in the record for review.* The doctrine that it is better practice to admit evidence subject to objection should be taken to mean that even if the evidence is *ruled* by the master or chancellor to be *inadmissible,* it should nevertheless, upon request, *be permitted to appear in the record.* It should not be taken to mean that the master or the chancellor should omit to rule upon objections. Rulings are necessary to advise lawyers how the master or chancellor regards the evidence.

In Illinois incompetent testimony should be objected to, lest it be treated as competent, in the absence of objections (Millard v. Millard, 221 Ill. 86; which in effect overrules Goelz v. Goelz, 157 Ill. 39).

Testimony in chancery, reduced to writing, usually appears in the record under one or more of the following four forms:

1. *A judge's certificate of evidence* (White v. Mor-

rison, 11 Ill. 361; Owen v. Ranstead, 22 Ill. 172): Testimony orally delivered by the witness himself in open court, before the judge who passes upon it, reduced to writing and verified by a stenographer, then certified by the judge as being a complete and true record of the proceedings and evidence before him, and *ordered by the judge to be made a part of the court record of the cause.* Such testimony is neither subscribed nor verified by the witness.

Documents may be introduced with or without such oral testimony; and documents may constitute the entire subject-matter of the certificate of evidence.

2. *A master's report or certificate of evidence* (White v. Morrison, *supra;* Owen v. Ranstead, *supra:* Testimony orally and publicly delivered by the witness himself before the master who passes upon it, reduced to writing and verified by a stenographer, then certified by the master as being a complete and true record of the proceedings and evidence before him, and usually included in the master's report or certificate to the court; which report of itself is part of the court record of the cause. Testimony before the master is usually read over, subscribed and verified by the witness, and is loosely termed a deposition, because so subscribed and verified. The only requirement laid down in court rules or chancery practice is that testimony taken *viva voce* before a master shall be reduced to writing by the master or his clerk, and preserved in the master's office for use in court, if necessary (McClay v. Norris, 9 Ill. 386; 1 Barb. Ch. Pr. 502; Smith's Ch. Pr. Vol. 2, p. 147; Rule 69 Eng. Ch. Orders, 1828; N. Y. Ch. Rule 105; U. S. Eq. Rule 81; N. J. Ch. Rules 44, 196; Ch. Rule No. 4 governing masters in Chicago). There seems to be no rule of court or statute requiring testimony before the master to be read over and subscribed and verified by the witness, as is the case with depositions. It is good practice in New York state, to have it done (1 Barb. Ch. 503; Remsen v. Remsen, 2 Johns. Ch. 393); and an Illinois case holds such testimony should be subscribed by the witness (Eisenmeyer v. Sauter, 77 Ill. 515).

Documents may be introduced with or without such oral testimony, and may form the entire subject-matter of a master's report of evidence; as for example, the trust deed and notes in a foreclosure suit.

Unless the master is directed by statute, by rule of court, or by the order of reference, to report the evidence back to court, he need not do so (Hayes v. Hammond, 162 Ill. 135; Schnadt v. Davis, 185 Ill. 476; Prince v. Cutler, 69 Ill. 267; Pierce v. Cox, 120 Ill. 556).

3. *A deposition* (Jackson v. Sackett, 146 Ill. 646; Ryan v. Sanford, 133 Ill. 291): A sort of secondary evidence read to the court or master (Weeks on Dep. p. 6; Sexton v. Brock, 15 Ark. 345; Haupt v. Henninger, 37 Pa. St. 138); being testimony under oath, subscribed (1 Barb. 285) and verified by the witness, and delivered out of court and according to statute, or under a court's special commission, before a commissioner, an examiner or a notary public, and by such officer reduced to writing, verified, certified and returned to the court, for the purpose of being read to the court or master who is to pass upon the evidence. Loosely speaking, all deposing under oath, whether before the court, master, special commissioner, examiner, notary, or in an affidavit, is called a deposition; but in a strict sense, the term "deposition" should be limited as in this paragraph defined. It is totally different from the testimony before the court or before a master, and the laws regulating depositions have no application to such oral testimony before the court or before the master (13 Cyc. 832; Troy Iron v. Corning, 7 Blatchf. 16; Mason v. Blair, 33 Ill. 204; Cox v. Pierce, 120 Ill. 556). Statutes and formal rules of court, differing in every jurisdiction, govern the taking and returning of depositions. Oral evidence in the master's office is like oral evidence before the judge (Cox v. Pierce, 120 Ill. 556). Documents may be introduced in connection with deponent's testimony.

4. *Affidavits*: Statements made out of court without opportunity for cross-examintion and sworn to before any officer empowered to take oaths, anciently

much used but in modern times limited to injunction cases, and a few other *ex parte* motions. In Illinois affidavits may be used to support the bill or the answer upon motions to dissolve an injunction (Ill. Stat. Injunc. sec. 17); and upon motions for a continuance (Ill. Stat. Prac. sec. 62-64, also Chan. sec. 37). They are used also to compel the production of books and writings (Ill. Stat. Evid. sec. 9). Illinois students will note the following change in the Practice Act, permitting oral examinations to take the place of affidavits:

Affidavits, or oral examination (Sec. 86, Ill. Practice Act): "Whenever in any suit or proceeding at law or in equity in any court of record evidence shall be necessary concerning any fact which, according to law and the practice of the court, may now be supplied by affidavit, the court may, in its discretion, require such evidence to be presented, wholly or in part, by oral examination of the witnesses in open court, or, in equity cases, before a master in chancery, upon notice to all parties not in default, or their attorneys; and whenever such evidence is presented by oral examination, an adverse party shall have the right of cross-examination. Evidence so presented may be preserved by bill of exceptions or certificate of evidence. This section shall not apply to applications for change of venue."

As a general rule affidavits can be used as evidence before the master only when authorized by the order of reference, or when under the same circumstances a court may proceed upon affidavits (1 Barb. 495). According to the federal practice and also in Cook County, Illinois, depositions, affidavits and documents previously introduced and on file in the cause may be used as evidence before the master if produced before him (U. S. Eq. rule 80; Cook County Chan. rules).

The reasons for verifying a deposition:

Testimony heard and taken by others than the chancellor or master who judges the case upon it—in other words, depositions—should be as well authenticated as

is practicable, and therefore should be verified and subscribed by the witness himself, after being read over to him, as well as be signed and vouched for by the notary or examiner who writes it down. In taking depositions, the questions and answers are directly written down in long hand or upon the typewriter machine, so that the witness may subscribe his testimony then and there, while it is fresh in the minds of his hearers. (2 Dan. 585.) Otherwise, a special order of court may be necessary to bring the witness back on another day to sign; and, besides, such deferred signing practically gives to the witness power to refuse to sign his deposition unless certain answers are changed to what he claims were, or were meant to be, his answers. In taking depositions, stenography should not be used, because it divides the responsibility and displaces the certainty of the examiner who himself writes down the answers, or sees them written down; and stenography, requiring later to be transcribed upon the typewriter, necessarily postpones the signing by the witness to another day, when neither stenographer nor examiner may be able to remember the answers. Thus, sinister changes, under the guise of corrected answers, may be made. A witness' testimony should be signed each day. (1 Barb. 282). Witnesses may make honest mistakes, but their original answers should stand as made. If they wish to correct their answers, the record of the additional evidence should show the explanation for making the changes, as well as the new answers given.

The modern piecemeal mode of taking evidence in chancery by depositions, or, in the master's office, upon continuance after continuance, already too much encourages unscrupulous parties in the fabrication of evidence. Modern chancery cases frequently present a suspicious conflict of evidence on every point. Therefore, the court should give the witness as little opportunity as possible to change answers upon a subsequent date. Testimony orally delivered before the chancellor or master and taken down by a stenographer is not only burdened by the requirement that it be subsequently verified and subscribed by the witness (as if

it were a deposition) but is also subjected to risk of dishonest changes. Such verification and subscription may be waived if the testimony is properly vouched for or certified by the master (Dorn v. Ross, 177 Ill. 228). But, as before remarked, it is the prevailing practice to have testimony orally delivered before the master verified and signed by the witness.

EVIDENCE IN THE MASTER'S OFFICE IN COOK COUNTY, ILLINOIS.

The master is required by the Cook County, Illinois, rules of the Superior and Circuit Courts, as soon as practicable to fix a day to proceed with the taking of testimony or evidence on the reference. Either party may move the master to fix a day. On the day so fixed, the master is required to proceed with the taking of testimony or evidence; and on the day so fixed the master, in his discretion, may fix a day within which the complainant shall close his proofs; which time he may, in his discretion, for good cause shown, extend for such reasonable time as justice may require. A motion on the part of the defendant to the effect that complainant close his proof within a certain time is premature if made before the day fixed by the master for beginning the taking of testimony.

As soon as the complainant has closed his proofs, the master is required by the rules to fix a time within which the defendant shall close his proofs and the complainant his proofs in rebuttal, and in his discretion, for good cause, the master may extend the time for such reasonable time as justice may require. As a matter of right, therefore, the complainant, when he closes his proofs, can move the master to fix a time within which the defendant shall close his proofs; but the rules require the master at the same time also to fix the time for the complainant to close his proofs in rebuttal. In case the parties shall not close their proofs within the time limited by the master, the master is required by the rules to proceed to make up his report upon the testimony and evidence that may have been submitted to him, without waiting for further

evidence or testimony from the party so failing to close his proofs within the time limited.

It is the better practice to have the originals of notices respecting hearings, motions and rulings signed by the master in chancery, though caused to be served by the solicitors of the party. Such original notices should be filed with the master as a part of the court files, at the next hearing, in order that they may form a part of the record of proceedings and evidence before the master.

In Illinois, under Section 38 of the Statute on Evidence, chancery courts in cases not referred to a master, are compelled to receive *oral evidence upon the trial* if either party desires it (Owen v. Ranstead, 22 Ill. 171). Under the old practice, which still also obtains in Illinois and in most other jurisdictions, evidence in chancery was and is taken out of court usually in the form of depositions.

Upon a general reference to the master authorizing the master to take and report the evidence, together with his conclusions of fact and law thereon, proper practice requires that all the evidence in the case be introduced on the hearing before the master. A leading case to this effect is Cox v. Pierce, 120 Ill. 556.

Section 38 of Chapter 51, Illinois Statutes, entitled "Evidence and Depositions," provides that:

"On the trial of every suit in chancery, oral testimony shall be taken when desired by either party."

Section 39 of Chapter 22 provides that:

"Upon default or upon issue joined, the court may refer the cause to a master in chancery to report the evidence, with or without his conclusions thereon."

The following is quoted from Cox v. Pierce:

"These sections must, then, be construed as parts of a single system, and so as to give effect to both. We cannot suppose that the legislature intended to confer upon the circuit courts so useless a power as that of referring causes to masters in chancery to take and report the evidence, together with their conclusions thereon, when such evidence and report might be entirely disregarded by either party, and the court be required to again listen to all the evidence

detailed orally by witnesses. The words 'the evidence in the case' unquestionably mean all the evidence in the case, and the only purpose in allowing it to be referred to the master to take it and report it, with or without his conclusions thereon, to the court, is to lighten to that extent the labors of the court. It must therefore have been intended that *oral evidence, instead of depositions,* shall be taken on the trial of every suit in chancery, when desired by either party; but when it is referred to the master to take and report the evidence in the case, and his conclusions thereon, all the evidence, whether in depositions or documents, or to be detailed by the mouths of living witnesses, must be introduced before him; and when thus introduced and afterwards properly reported by the master to the court, it is, in the language of Section 38, Chapter 51, *supra,* 'taken on the trial.' And on the assumption that this is the correct construction of the sections, we held in Prince v. Cutler, 69 Ill. 267, that upon hearing exceptions to the master's report, it is not competent to hear any evidence that was not before the master when he made his report."

Evidence cannot be introduced on the hearing of exceptions to the master's report which was not introduced before the master (Cox v. Pierce, 120 Ill. 556; Smith v. Billings, 170 Ill. 543; Brueggestradt v. Ludwig, 184 Ill. 36; Wall v. Stapleton, 177 Ill. 360).

In the case last cited, although the chancellor admitted certain evidence in open court after the hearing before the master, the Supreme Court decided that the evidence so admitted was merely cumulative and was not a cause for reversal, inasmuch as the decree was clearly right on the evidence before the master, aside from the additional cumulative evidence.

The case of Henderson v. Harness, 184 Ill. 527, is not in point. In that case it does not appear that the chancellor heard any evidence in addition to the evidence heard by the master.

Parties must appear before the master and take their proofs upon an order of reference. They cannot omit to do this and offer proof on the hearing before the chancellor (Gould v. Banking Co., 36 Ill. App. 390).

If the chancellor wishes more evidence to be taken,

after the master's report is on file, the cause should be re-referred to the master for that purpose (Wall v. Stapleton, 177 Ill. 357. See Ill. Cyc. Dig., "Master in Chan.").

Under the old chancery practice as it prevailed before statutes permitted oral evidence in chancery suits, and as it still prevails in most jurisdictions, no *viva voce* evidence was permitted at the hearing for decree, except as follows:

Exhibits, deeds and other written instruments relating to the cause may be produced and proved *viva voce* on the hearing for decree where the party using them has omitted to establish their genuineness before the officer taking the proofs (1 Barb. 308; Holdridge v. Bailey, 5 Ill. 125; McClay v. Norris, 9 Ill. 370). A satisfactory excuse must be given for not having made proof in the usual way (Cosequa v. Fanning, 2 Johns. Ch. N. Y. 481).

Whether in Illinois the case of Holdridge v. Bailey, is overruled by the case of Cox v. Pierce, is doubtful in the writer's opinion.

Evidence heard and taken by one master cannot in Illinois be considered by another master, but may be considered by the court (Coel v. Glos, 232 Ill. 147). Therefore, where the testimony in a cause has been taken by different masters, each should report only for the part heard by him. (McMahon v. Rowley, 238 Ill. 31).

Under an order of reference to take proofs and report the same with his conclusions, the master must cause the witnesses to be brought before him and examined in his presence, and he must cause the testimony to be reduced to writing and embody the same in his report (Schnadt v. Davis, 185 Ill. 476).

OBJECTIONS TO EVIDENCE IN COOK COUNTY.

Under the rules governing masters in Cook county, Illinois, objections to the master's rulings on evidence should be brought before the chancellor *after* the evidence and testimony before the master is closed and

before the master makes his report. Note the following case:

"Notwithstanding this ruling of the master (rejecting certain testimony), counsel made no application to the court to require the master to admit the evidence in question, but without the rejected evidence allowed the master to proceed to make his report and excepted before the chancellor to the ruling of the master in rejecting the evidence. This was not, in our opinion, the proper practice to pursue, but counsel, *before the making of the master's report* (according to chancery rules of court), should have taken the question of the admissibility of this evidence before the chancellor and had his rulings thereon; when, if the contention should have been sustained by the court, the master would then have received the evidence and passed upon it in making his report. We think that counsel should not be permitted thus to speculate upon the findings of the master and the chancellor, and should now be precluded from claiming that there was error in the master's ruling." (Dickinson v. Torrey, 91 Ill. App. 304, citing Brueggestradt v. Ludwig, 184 Ill. 28-37; Glos v. Hoban, 212 Ill. 222). In other jurisdictions the general practice is to seek the opinion of the court on the master's rulings upon evidence when the master has made his report (1 Barb. 484).

NATURE OF HEARING BEFORE MASTER, IN ILLINOIS.

Upon the hearing before the master in chancery, "the parties have the same right to be heard, by themselves or by counsel, to introduce evidence, cross-examine witnesses, and to take the various steps authorized by law, as if the hearing was before the chancellor instead of the master" (U. M. Life Ins. Co. v. Slee, 123 Ill. 94).

The party is entitled to be present and listen to the testimony of the witness as it is detailed by him in chief, and then, or as soon thereafter as convenience will admit, to cross-examine him; and it does not cure the error of denying this opportunity to allow him,

at some subsequent day, to have the witness brought before the master in chancery for his cross-examination. Notice is important that a party shall be allowed an opportunity to confront witnesses who may testify against him while giving their hostile evidence (U. M. Life Ins. Co. v. Slee, 123 Ill. 94).

PRODUCTION OF BOOKS AND WRITINGS, PROOF OF STATUTES, OF RECORDS OF COURTS AND CORPORATIONS.

The statutes of the various states differ but slightly as to producing books and writings in evidence, and as to proving the statutes or the court decisions of the state, or as to proving the records of courts or of municipal and private corporations. Much trouble is caused by ignorance of such statutes. A brief recital of the substance of the Illinois statutes will serve to call students' attention to the statutes of their own states.

Production of Books and Writings: The courts of Illinois have power, upon motion, and upon good and sufficient cause, shown by affidavit that certain books or writings contain evidence pertinent and material to the issue, and upon reasonable notice to produce them, to require either party to produce such books or writings in their possession or power (Ill. Stat. Evid. Sec. 9; 1st. Nat. Bank v. Mansfield, 48 Ill. 494). Where books are to be produced, the defendant may seal up and cancel all such parts as, according to his affidavit previously made and filed, do not relate to the matters in question (Pynchon v. Day, 118 Ill. 9). Notice to the adverse party to produce papers in his custody entitles party giving notice to no advantage on their non-production, except the right to introduce secondary evidence (Hoagland v. G. W. Tel. Co., 30 Ill. App. 304). Abuse of the right of inspection may be prevented by the terms of the order requiring production; and in framing the same the court may exercise a discretion for the prevention of annoyance or the indulgence of impertinent curi-

osity (Rigdon v. Conley, 31 Ill. App. 630). This statute does not give the court power to take the books and papers of the party and impound them with an officer of the court for inspection or examination out of the presence of the court (Lester v. P., 150 Ill. 408, 1894). The statute and the cases treat only of the power to require *parties* to produce. The writer doubts the power of courts to deprive one not a party, of his own property in the shape of books and writings.

Printed Statutes: The statute books purporting to be printed under the authority of the United States or of any state or territory, are evidence in all courts in Illinois, of the acts therein contained (Ill. Stat. Evid. Sec. 10).

Reported Decisions of Courts: The books of reports of decisions of the Supreme Court and other courts of the United States, and of the several states and territories thereof, purporting to be published by authority, may be read in Illinois as evidence of the decisions of such courts (Ill. Stat. Evid. Sec. 12).

Court Records—Certified Copies: In Illinois the papers, entries and records of courts may be proved by a copy, certified under the hand of the clerk of the court having the custody thereof, and the seal of the court, or by the judge of the court, if there be no clerk (Ill. Stat. Evid. Sec. 13).

Records of Municipal Corporations—Certified Copies: In Illinois the papers, entries, records and ordinances of any city, village, town or county may be proved by a copy, certified under the hand of the clerk or the keeper thereof, and the corporate seal, if there be any; if not, under his hand and private seal (Ill. Stat. Evid. Sec. 14).

Records of Other Corporations—Certified Copies: In Illinois the papers, entries and records of any corporation may be proved by a copy, certified under the hand of the secretary, clerk, cashier or other keeper of the same. If the corporation or incorporated association has a seal, the same shall be affixed to such certificate (Ill. Stat. Evid. Sec. 15).

Form of Certificate: The certificate under the three preceding paragraphs should state that the person certifying is the keeper or custodian of the records, entries or papers, and whether or not there be a seal (Ill. Stat. Evid. Sec. 16).

Sworn Copies: Any such papers, entries, records and ordinances may be proved by copies examined and sworn to by credible witnesses (Ill. Stat. Evid. Sec. 18).

WITNESSES.

Witnesses living within the jurisdiction wherein the cause is pending may be subpœnaed to testify before the court, before a commissioner or examiner appointed to take testimony, or before a master to whom a reference has been made. The clerk of the court in which the cause is being tried, or the master or other officer taking testimony or taking depositions, will, upon request by either party, issue a subpœna for the purpose (Ill. Stat. Prac. sec. 22; Ill. Stat. Evid. sec. 36).

In the courts of the United States, a witness cannot be deemed guilty of contempt for not obeying a subpœna unless his fee for going and returning and for one day's attendance is paid or tendered him at the time the subpœna is served (U. S. Eq. Rule 78; Revised Statutes, Sec. 870).

In Illinois the statute is as follows:

(Ill. Stat. Fees, Sec. 47). "Every witness attending in his own county upon trials in the courts of record shall be entitled to receive the sum of one dollar for each day's attendance and five cents per mile each way for necessary travel. For attending in a foreign county, going and returning, accounting twenty miles for each day's travel, for each way one dollar. Every person attending for the purpose of having his deposition taken, one dollar, and the same mileage as provided in this section for witnesses in courts of record: PROVIDED, no allowance or charge shall be made for the attendance of witnesses aforesaid unless the witness shall make affidavit of the number of days

he or she actually attended, and that such attendance was at the instance of one or both of the parties or his attorney." (See also Ill. Stat. Evid. Sec. 37).

Subpœna duces tecum. Either party to a suit may obtain from the clerk of the court, upon proper order of the court, a subpœna *duces tecum* requiring the witness therein named to appear and testify before the court, commissioner or master, at the time and place named in the subpœna, and to bring with him and produce before said court, commissioner or master any paper, writing, instrument, book or document supposed to be in his possession, the same to be described in said subpœna; provided, it is made to appear to the court, by affidavit or otherwise, that there is reason to believe that said writing, paper, instrument, book or document is in the possession or power of said witness, and if produced would be competent evidence on behalf of the party applying for the order. There is no reason for thinking that a person not a party to the suit can be deprived of his own property by means of *subpœna duces tecum.* (See, production of documents.)

In Illinois the master has statutory power to compel the attendance of witnesses, and upon an order of reference containing proper directions to the effect, he may, by a master's subpœna, compel the production of books and papers. (See Forms, Order of reference).

In Illinois (Ill. Stat. Oaths and Affirmations; 1 Barb. Chan. 281) the form of oath or affirmation administered to witnesses is as follows:

(Witness is first directed to lift up his hand.) "You do solemnly, sincerely and truly swear by the ever living God that you will make true answers to all questions which shall be put to you upon your examination in this cause, and therein you will speak the truth, the whole truth, and nothing but the truth, so help you God."

If the witness has scruples against taking the oath, his hand is not lifted up, and he is affirmed as follows:

"You do solemnly, sincerely and truly declare and

affirm that you will make true answers to all questions which shall be put to you upon your examination in this cause, and therein you will speak the truth, the whole truth and nothing but the truth."

If a witness does not understand English, an interpreter may be sworn to interpret truly, and the deposition is taken down from the interpretation in English. The oath administered to the interpreter is as follows:

"You do solemnly, sincerely and truly swear by the ever living God that you will truly and faithfully interpret the oath to be administered and the questions to be put to ——— a witness now to be examined, out of the English language into the ———— language, and that you will truly and faithfully interpret the answers thereto out of the ————— language into the English language" (1 Barb. Chan. 285).

THE HEARING IN COURT.

On the hearing, the complainant's bill is first read or stated in substance; then the defendant's answer; after which the matters in issue are stated to the court, together with the equitable points of law arising thereon. Then the complainant's evidence is read to the court, and after this the defendant's evidence, and then again the complainant's evidence in rebuttal. If the cause is on hearing upon a master's report, the evidence is not read, but the master's findings are read, also the exceptions thereto, if any were filed. After this follows the argument of the complainant's solicitor, which is followed by that of the defendant's solicitor, after which the complainant's solicitor may reply in conclusion.

"Preparatory to submitting a cause to the court for hearing upon the pleadings and evidence, *if the same are voluminous,* proper abstracts thereof, with indexes thereto, should be prepared. The evidence bearing upon each issue or distinct question of fact should, so far as possible, be grouped together. There is no other step in the preparation and submission of a cause in which care, discrimination and thoroughness on the

part of counsel, are of greater moment than in bringing together in logical and lucid form and sequence, the vital issues of fact in the case and the evidence applicable thereto" (Judge Shiras, Eq. Pr.) The Circuit Court of Cook County, Illinois, chancery rules also require such abstracts upon request of the chancellor. The Superior Court rules require such abstracts if the evidence is by deposition, or was taken before a master.

"After taking evidence is closed and before final rendition of decree, if a party desires to present any new matter in the way of issue or evidence, he must apply for leave to the court by petition setting up the new matter or issue, so that its relevancy and materiality may be judged, and asking leave to introduce further evidence, or to amend the pleadings, and also showing the reasons why the party was not at fault in not earlier presenting the matter" (Shiras, Eq. Prac.).

DECREES AND ORDERS.

A decree is the decision and mandate of a court of equity upon issues properly presented and heard by the court. Decrees are final or interlocutory.

"When the decision of the court is made known, a decree in accordance therewith should be prepared and be submitted to the judge for signature, and when signed it must be filed with the clerk for entry. It should clearly set forth the exact findings of fact as set forth in the pleadings and evidence, and the findings of law by the court upon the issue or issues passed upon; and if by such judgment the defendant is required to do or refrain from doing any act, the same should be set forth clearly in the mandatory part of the decree; and, in the case of performance, the time, mode and condition thereof should be made plain" (Shiras Eq. Prac.).

It is the duty of a solicitor obtaining orders and decrees in chancery to prepare them and see that they are recorded (Schlesinger v. Allen, 69 Ill. App. 137). He serves upon the opposite solicitor a copy of the

order or decree,with notice of the time and place when and where he will apply to the court to have the order or decree settled. If it is satisfactory opponent's solicitor usually indicates, by an endorsement on the draft, his consent. If it is not satisfactory, he proposes amendments and appears before the court, and the court settles the decree. When a mistake or clerical error has been made in a decree, it may be corrected by the court, upon motion or petition, made after entry and before enrollment (Bates v. Garrison, Har. Ch. 221). The party making the application must show that he has been injured by the error or mistake (Yarnell v. Brown, 170 Ill. 362; Russell v. Wait, Walk. Ch. 31).

FINAL AND INTERLOCUTORY DECREES.

A decree which finally disposes of the rights of the parties upon the merits of any branch of the controversy is final; but if the merits are not passed upon, and the order is made simply to take an additional step towards a final determination upon the merits, it is an interlocutory decree.

The distinction is important, because the right to appeal from a decree is statutory and must be strictly followed, and the statute usually restricts the right to appeal to final decrees.

Any decree which divests a party of a pre-existing legal right is called a final decree.

Judgment sustaining a demurrer without dismissing the bill is not final but interlocutory (Knapp v. Marshall, 26 Ill. 63; Campbell v. Powers, 139 Ill. 135). A decree ordering an act to be done before the decree can be effectual is an interlocutory decree (Hayes v. Mays, 1 J. J. Marsh, 497).

If the decree accomplishes the purposes of the suit by determining litigated matters or questions included within the issues, and, without further judicial action, fixes rights and liabilities of parties —as by settling the title or right of possession to property, or directing performance of a specific act, or directing the sale of property upon foreclosure

of mortgages or other liens—in these and like cases the decree is deemed to be final for the purposes of appeal, although the trial court may continue its jurisdiction over the case for ministerial purposes, such as making sale of property or taking an account rendered necessary by the terms of the decree, or otherwise executing the decree rendered. (*In re* Farmers Loan & Trust Co., 129 U. S. 206; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207; Wheeling & B. Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287; Fowler v. Hamill, 139 U. S. 549; Hill v. Chicago R. R. Co., 140 U. S. 52; Bank v. Sheffey, 140 U. S. 445.)

If, however, the decree, although in form final, cannot be immediately carried into effect, and does not execute itself, but to that end needs further judicial action on the part of the court, it is deemed to be interlocutory only, and therefore an appeal cannot be taken therefrom (Meagher v. Thresher Co., 145 U. S. 608; McGourkey v. Toledo & O. C. R. Co., 146 U. S. 536; Luxton v. North River Bridge Co., 147 U. S. 337; Hohorst v. Hamburg Am. Packet Co., 148 U. S. 262; Latta v. Kilbourn, 150 U. S. 524).

Until final decree, all previously rendered decretal orders are before the court for review, and may be modified or vacated as circumstances may require (Jeffery v. Robbins, 167 Ill. 375).

Appeals from Certain Interlocutory Decrees: The Illinois Practice Act, Section 123, provides that "whenever an interlocutory order or decree is entered in any suit pending in any court of this state, granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, an appeal may be taken from such interlocutory order or decree to the appellate court of the district wherein is situated the court granting such interlocutory order or decree."

PRO CONFESSO DECREES.

If a defendant, having been duly served, fails to enter an appearance at the proper time, or, having appeared, fails to file a plea, demurrer or answer to the bill by the proper day, the complainant may have the court enter an order finding such defendant to be in default and that the bill be taken *pro confesso.*

A default should not be taken against defendants served by publication without return of summons "not found" (Cost v. Rose, 17 Ill. 276).

In Cook County, Illinois, chancery rule 2 provides that on and after the third day of each term, defaults may be entered as to defendants properly served who have filed no appearance in writing.

Thereupon the cause may proceed *ex parte,* and decree therein may be entered; or the complainant, if he requires an answer to enable him to obtain a proper decree, may procure process of attachment against such defendant, upon which process the defendant may be arrested and held until he fully complies with the order of the court or judge as to pleading to or answering said bill (U. S. Eq. Rules 18, 19; Thomson v. Wooter, 114 U. S. 104). A decree *pro confesso* is also known as a "default decree," or "decree by default."

Decree Pro Confesso in Illinois under Chancery Act: "Every defendant who shall be summoned, served with a copy of the bill or petition, or notified as required in this Act, shall be held to except, demur, plead or answer on the return day of the summons; or, if the summons is not served ten days before the first day of the term at which it is returnable, by the first day of the next term; or, in case of service by copy of the bill or by notice, at the expiration of the time required to be given, or within such further time as may be granted by the court; or, in default thereof, the bill may be taken as confessed" (Ill. Stat. Chan. Sec. 16).

The Illinois Practice Act permits the court, on the appearance of the defendant, to allow such time to plead as may be deemed reasonable or necessary (Ill.

Stat. Prac. Sec. 44). Rule I of the Cook County chancery courts, upon entry of appearance, allows defendants twenty days after the first day of the appearance term to except, plead, demur or answer.

Neither default nor decree *pro confesso* can be entered against an infant (Chaffin v. Kimball Heirs, 23 Ill. 36).

A bill cannot be taken as confessed against minor defendants (Rhoads v. Rhoads, 43 Ill. 239). In such case the evidence in the record must sustain the decree (Seiler v. Schaefer, 40 Ill. App. 74; Waugh v. Robbins, 33 Ill. 181).

Where bill praying an account is taken as confessed, the defendant who is not in default for want of appearance, must be given notice of the reference to the master, the report of the master, and of the decree (Acme Copying Co. v. McLure, 41 Ill. App. 397).

Pro Confesso Decree in Illinois, when vacated at next term: "If the defendant shall appear at the next term and offer to file his answer to the bill, the court may permit him to do so, upon his showing sufficient cause, and paying the costs of the preceding terms. In such case the decree shall be vacated and the cause may be proceeded in as in other cases" (Ill. Stat. Chan. Sec. 17).

An answer stating meritorious defense should be presented with the motion to set aside default (Schneider v. Seibert, 50 Ill. 284; Grubb v. Crane, 5 Ill. 4 Scam. 155).

The vacation of a *pro confesso* decree is discretionary; the ruling is reviewed only for abuse (Smith v. Brittenham, 88 Ill 291).

Evidence on Decree Pro Confesso in Illinois—Final Decree: "Where a bill is taken for confessed, the court, before a final decree is made, if deemed requisite, may require the complainant to produce documents and witnesses to prove the allegations of his bill, or may examine him on oath or affirmation touching the facts therein alleged. Such decree shall be made in either case as the court shall consider equitable and proper" (Ill. Stat. Chan. Sec. 18).

A default admits that facts stated in the bill are true, but does not admit that they constitute a cause of action (Board of Madison County v. Smith, 95 Ill. 328).

On default, it is error to render decree for more than is claimed in bill (Beese v. Becker, 51 Ill. 82).

When Pro Confesso Decree set aside in Illinois—Defendant not served may have decree vacated within three years: "When any final decree shall be entered against any defendant who shall not have been summoned or been served with a copy of the bill, or received the notice required to be sent him by mail, and such person, his heirs, devisees, executor, administrator or other legal representatives, as the case may require, shall within one year after notice in writing given him of such decree, or within three years after such decree, if no such notice shall have been given as aforesaid, appear in open court and petition to be heard touching the matter of such decree, and shall pay such costs as the court shall deem reasonable in that behalf, the person so petitioning may appear and answer the complainant's bill; and thereupon such proceedings shall be had as if the defendants had appeared in due season and no decree had been made. And if it shall appear, upon the hearing, that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended, as shall appear just; otherwise the same shall be ordered to stand confirmed against said defendant. The decree shall, *after three years from the making thereof, if not set aside in manner aforesaid, be deemed and adjudged confirmed* against such defendant, and all persons claiming under him by virtue of any act done subsequent to the commencement of such suit; and at the end of the said three years, the court may make such further order in the premises as shall be required to carry the same into effect" (Ill. Stat. Chan. Sec. 19).

On final hearing, the original decree is presumed correct until overcome by evidence (Bruner v. Battell, 83 Ill. 317). After three years, defendant has five years more in which to bring writ of error (Lyon v.

Robbins, 46 Ill 276; Sale v. Fike, 54 Ill. 292). Setting aside default decree under statute, within three years, annuls all rights acquired under it; until three years have passed such decree is merely interlocutory. (Martin v. Gilmore, 72 Ill. 193). At the end of the three years (if proceeding to vacate decree has not been begun) such decree stands on same footing as if there had been personal service on defendant (Caswell v. Caswell, 120 Ill. 377).

ENFORCEMENT OF DECREES.

It is one of the maxims of equity that a decree acts *in personam*. By this is meant that the decree is enforced, if necessary, by issuing an attachment upon the person, when within the jurisdiction of the court, and also by sequestration of the goods and lands (within the jurisdiction) of the defendant, until the defendant complies with the decree, which usually orders the defendant personally to do, or cause to be done, or refrain from doing, certain acts.

Performance of decree is enforced by process for contempt, because the defendant, having been commanded, is, by his neglect or disobedience, in contempt of the authority of the court. The law courts can go no farther than to issue a process to satisfy the plaintiff's demand by seizure and sale of his property. In chancery it is not usual to issue process of execution (Karnes v. Harper, 48 Ill. 527). But it may be done (Johnson v. Johnson, 125 Ill. 521).

Before a defendant is deemed to be in contempt, he must be personally served with a writ of execution, under the seal of the court, which recites that part of the decree which the defendant is to obey. A party is in contempt if he neglects to comply with the decree within the time therein specified.

If the party has been served with a writ of execution and he neglects to obey it, the fact is brought to the attention of the court by affidavit, and a writ of attachment is issued, upon which the party is arrested and brought before the court, and if he does not purge

himself of the contempt or comply with the mandate at once, he is committed to jail.

Section 44 of the Illinois Chancery Code provides that "a decree for money shall be a lien on the lands and tenements of the party against whom it is rendered, to the same extent and under the same limitations as a judgment at law." This section controls decrees *in personam,* but not *in rem,* as for sale of mortgaged lands; decrees in *personam* are a general lien, those *in rem,* a specific lien (Karnes v. Harper, 48 Ill. 527). The right to enforce decrees by execution is inherent in courts of equity (Johnson v. Johnson, 125 Ill. 513).

Section 45 of the Illinois Chancery Code provides that "all decrees given in causes in equity in this state shall be a lien on all real estate respecting which such decrees shall be made; and whenever by any decree any party to a suit in equity shall be required to perform any act other than the payment of money, or to refrain from performing any act, the court may, in such decree, order that the same shall be a lien upon the real or personal estate, or both, of such party, until such decree shall be fully complied with; and such lien shall have the same force and effect, and be subject to the same limitations and restrictions, as judgments at law."

INTERLOCUTORY PROCEEDINGS OR MOTIONS.

An interlocutory proceeding or motion, is an application or request made to the court for its aid either to further the proceeding or to protect the rights of some of the parties to the suit. Such applications may be made orally, and are then called motions, or in writing, when they are called petitions. The request should be in writing if based upon a long statement of facts.

Motions are: Motions of course, and motions not of course. Motions of course are those which are granted as a matter of course under some standing rule, or according to the known practice of the court. Motions not of course are those which will be granted or refused according to the discretion of the court.

Cook County Chancery rule 4, provides that the following motions, among others, shall be considered as motions of course: Motions for default; default decrees, for appointment of commissioners in partition, for confirmation of reports of commissioners and of masters where no exceptions are filed; motions for rules to plead, answer or demur; motions concerning amendments of pleadings, or for leave to file any pleading or paper; to set aside defaults; for new bonds; that sureties justify; concerning *ne-exeats;* for *ex-parte* injunction orders; touching the custody of children; motions for reference to a master, and for contempts of court.

In Cook County, Illinois, according to rule 4, contested motions shall be deemed to include all motions pertaining to the settling of pleadings; for alimony and solicitors' fees; for injunctions upon notice; to dissolve injunctions; for the appointment and removal of receivers; the hearing of exceptions to master's and receivers' reports; and all other opposed motions, the hearing of which will operate to unduly delay the court in its other duties.

DISMISSAL OF BILL.

A complainant in chancery has the right at any time before decree rendered to dismiss his bill, unless a cross-bill has been filed (Blair v. Reading, 99 Ill. 600); and this is so even after the case has been taken under advisement (Langlois v. Matthiessen, 155 Ill. 230). After a decree, the bill cannot be dismissed except by consent; but after a reversal of a decree without directions, the complainant may dismiss the bill; the effect of the reversal being to leave the cause pending for hearing as if no decree had been rendered (Mohler v. Wiltberger, 74 Ill. 163). A bill should not be dismissed on motion except for want of equity or jurisdiction, on its face (Johnson v. Railway Co., 111 Ill. 417). A decree dismissing a bill needs no evidence to support it (Bank v. Baker, 161 Ill. 281). The dismissal

of a bill "without prejudice" and a simple dismissal of the bill will have the same effect as far as a new proceeding is concerned (Bates v. Skidmore, 170 Ill. 233).

DISMISSING THE BILL AT THE HEARING.

When the pleadings are defective, or when through some informality in the bill the court cannot give the complainant relief, or where from some other cause the bill is dismissed without the court passing upon the merits, and it appears that the complainant may be entitled to some relief, it will be dismissed *without prejudice* (Story's Eq. Pl. Sec. 456, 793).

But if a bill is dismissed by the court upon the hearing "for want of equity," such dismissal may be pleaded in bar to a new bill filed for the same cause of action; and a bill cannot be dismissed without prejudice when a new bill must cover the same ground (Crozier v. Acre, 7 Paige 137).

COSTS.

Costs are recoverable only in cases where there is statutory authority therefor (Smith v. McLaughlin, 77 Ill. 596). The Legislature may grant the power in general terms to the courts, which may make rules or orders under which costs may be taxed (Tesla Electric Co. v. Scott, 101 Fed. 524).

In the federal courts prior to the act of February 26, 1853 (U. S. Comp. Stat., 1901, p. 632) the taxation of costs in the different districts was according to the statutes of the state in which the district was situated (Primrose v. Fenno, 113 Fed. 375). The federal statute controls all costs mentioned therein (O'Neill v. K. C. R. R. Co., 31, 663).

Section 18 of the Illinois Costs Act provides that, "upon the complainant dismissing his bill in equity, or the defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant for costs; and in all cases in chancery not otherwise directed by law, it shall be in the discretion

of the court to award costs or not; and the payment of costs when awarded may be compelled by execution." The discretion of the court in awarding costs is a sound legal discretion, and should not be exercised to do injustice (Hollingsworth v. Koon, 117 Ill. 511).

In Illinois the statute requires that a non-resident complainant, before begining suit, shall file a bond, with a resident of the state as surety. If such bond is not filed upon the court's order, the suit must be dismissed, and plaintiff's attorney must pay all accrued costs. The bond must be substantially in the following form (Ill. Stat. Costs, Sec. 1 and 3):

(Venue)

Title of Court.

A. B.

vs.

C. D.

I (E. F.), do enter myself security for all costs which may accrue in the above cause.

Dated this.....day of.....A. D. 19..

(Signed) E. F.

If at any time after the commencement of the suit the complainant becomes a non-resident; or if the court be satisfied that complainant is unable to pay the costs of suit, or that he is so unsettled as to "endanger the officers of the court with respect to their legal demands" it is the duty of the court on motion of the defendant,or of any officer of the court, upon the proper statutory affidavit, to rule the complainant to give bond for payment of costs. Upon failure to file a bond, the suit will be dismissed (Ill. Stat. Costs, Sec. 4).

CHANCERY RECORD IN ILLINOIS.

The record of the decree of the trial court to be filed in the court of appeals or error, or in return to a writ of error, or *certiorari,* must contain, in chronological order, copies of: the process and service, the pleadings, the decree, all orders in the cause, the judge's certificate of evidence or all depositions, or the master's report and certificate of evidence, if any; and

the appeal bond, in case of appeal. In no case may the clerk insert in any transcript any matter not a part of the record; and the clerk of the reviewing court may not tax as costs any matter inserted contrary to rule (Rule 1, Illinois Supreme and Appellate Courts).

INJUNCTIONS.

An injunction is a writ granted by a court commanding an act to be done which the court regards as essential to justice (mandatory injunction), or forbidding an act which it deems against justice (preventive injunction).

Injunctions are (1) preliminary or interlocutory, or (2) perpetual. The first are granted prior to the final hearing and continue until answer or until final hearing, or until further order of the court. They do not determine the rights of the parties. Their purpose is to maintain the *status quo,* to continue property in its existing condition, to prevent further or impending injury—not to determine the right itself. If a preliminary injunction has the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted; nor will it be granted where the injurious acts have been completed; nor where they have been discontinued and there is no showing that they are likely to be renewed. Of course, it will not be granted where it is not apparent that any injury will occur (Cyc. Vol. 22, page 741). A perpetual injunction is one granted by the decree which finally determines the injunction suit.

In the great majority of cases, an injunction is merely a preventive remedy, and in some cases the courts have, on these grounds, refused to issue an injunction mandatory in its nature, or have declared that it is not the object of an injunction to redress a consummated wrong, or to undo what has been done; yet there is no doubt as to the power of the courts of record to issue mandatory injunctions. Because a mandatory injunction generally does something more than

to maintain the *status quo*, it is ordinarily improper to issue such an injunction prior to the final hearing; and it is frequently said that such a mandatory preliminary injunction will never issue (Cyc. Vol. 22, page 743).

Restraining orders: A restraining order is an order granted to maintain the subject-matter of the suit in its then condition until the hearing of the application for a temporary injunction. Its purpose is to merely suspend proceedings until there may be opportunity to inquire whether any injunction, even a preliminary one, shall be granted, and it is not intended as an injunction *pendente lite*. Its duration should be limited to such reasonable time as may be necessary to notify the adverse party; especially where the defendant is likely to be damaged by delay. It ceases to be operative at the time fixed by its terms. A restraining order contemplates a further hearing on the application for preliminary injunction upon notice to the adverse party, while the temporary injunction contemplates no further hearing until the final action is taken upon the application (State v. Baker, 62 Neb. 840; U. S. Stat. Restraining Orders).

Existence and nature of the right: The existence of a right and its violation are prerequisites to the granting of an injunction. The right asserted by complainant must be perfectly clear and free from doubt where the preliminary injunction will do more than merely maintain the *status quo*, or where the injunction will cause greater loss and inconvenience than will be suffered by complainant if no injunction be granted; and the bill must plainly show that an irreparable injury is impending and will occur before the final hearing can be had (Cyc. Vol. 22, page 754). The bill for injunction must show that the acts sought to be prevented will be a substantial violation of complainant's clear right and not a mere inconvenience to complainant's right (Mason v. Rollins, 2 Biss. 99).

Since a chancery decree acts *in personam*, a court having jurisdiction of the parties may grant and enforce an injunction, although the subject-matter af-

fected by it is beyond the territorial jurisdiction of the court (Alexander v. Tolleston Club, 110 Ill. 65).

In Illinois, by statute, no injunction will be granted without previous notice of the time and place of the application having been given to the defendants who can conveniently be served; unless it appears from the bill or affidavit accompanying the same that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately or without such notice; and in all cases, before an injunction shall issue, the complainant must give bond as may be required, unless, for good cause shown, the court, judge or master is of opinion that the injunction ought to be granted without bond.

Dissolving injunction and damages: In Illinois, after an injunction is dissolved, the court, before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting in writing the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require. A motion to dissolve an injunction may be made at any time upon answer, or for want of equity on the face of the bill. Upon a motion to dissolve an injunction after answer, the court shall not be bound to take the answer as absolutely true, but shall decide the motion upon the weight of the testimony (Ill. Statute on Injunctions).

As before stated, evidence in the form of affidavits may be used in Illinois to support the bill or answer, upon motions to dissolve an injunction (Ill. Stat. Injunc. Sec. 17); and the court may require oral evidence in lieu of such affidavits (Ill. Stat. Prac. Sec. 86). To warrant the issuing of a temporary injunction upon the allegations of the bill, the allegations must be verified positively, and not merely on information and belief (Crawford v. Bell. 95 Ill. App. 427).

RECEIVERS.

Definition: A receiver is an officer of the court, through whom the court takes possession of property which is the subject-matter of suit, preserves it from waste, destruction or loss, manages the same, secures

and collects the proceeds, and ultimately disposes of the property and proceeds according to the rights of those entitled thereto, whether they are regular parties in the suit or come in during the course of the proceedings and establish their rights. There must be a pending suit (Baker v. Adm. of Backus, 32 Ill. 79).

Situs of property: A receiver may be appointed for all property within the jurisdiction of the court, whether or not the owner is within such jurisdiction (Hutchinson v. American Palace Car Co., 104 Fed. Rep. 182); and a receiver may be appointed for the express purpose of preventing the removal beyond the jurisdiction of property within the jurisdiction of the court (Loaiza v. Superior C. T., 85 Cal. 11).

Object and grounds for appointment: It should appear from the bill that the object in having a receiver appointed is the preservation of the property which is the subject-matter of the suit, until a judicial determination of the rights of the parties thereto (Hooper v. Winston, 24 Ill. 353; Davis v. Gray, 16 Wall. 203). The principal ground for the appointment of a receiver is danger of loss or injury to such property before the court can decree disposition thereof on the merits. If there is no showing of probable danger or loss or injury to the property involved, no appointment will be made (Beecher v. Bininger, 7 Blatchf. U. S. 170; Bush v. Mattox, 110 Ga. 472). The court will not appoint a receiver unless it is shown that the possessor is insolvent, or at least that there is great doubt of his ability to satisfy a judgment for damages for loss or injury to the property (Haines v. Carpenter, 1 Woods U. S. 266); but insolvency is not sufficient as a sole ground for the appointment of a receiver (Onondaga Trust Co. v. Spartansburg Water Wks. Co., 91 Fed. 324) except in foreclosure cases (Hughes v. Hatchett, 55 Ala. 634). Where insolvency is likely to result in a loss of the fund or property in controversy, a receiver may be appointed on the ground of insolvency (Ryder v. Bateman, 93 Fed. Rep. 16).

It is a very high exercise of power for a court of chancery to take property out of the hands of its

owner, or of one in possession asserting himself to be its owner, and place it in the custody of a third person. Hence the court will exercise this extreme prerogative only when it is made to appear that the property will probably be wasted, secreted or misapplied, and that its rightful claimants will thereby be injured or defrauded if it is allowed to remain in its present hands (Crombie v. Order of Solon, 157 Pa. St. 588).

Receiver for a trustee: Danger to a trust fund or property is a prerequisite to the interference of the court with a trustee's possession (Middleton v. Doddswell, 13 Ves. Jr. 268; Richards v. Barrett, 5 Ill. App. 514); but if a trustee is guilty of positive misconduct or waste, or has improperly disposed of a part of the trust estate, or has an undue bias towards one of the contending parties, a receiver will be appointed (Am. and Eng. Encyc. 23, page 1012). When there is no person entitled to the property who is competent to manage it pending the suit, a receiver will be appointed (Skinner v. Maxwell, 66 N. C. 48).

The appointment of a receiver is a remedy of equitable origin and jurisdiction, and to maintain it there must exist no remedy at law (Wanneker v. Hitchcock, 38 Fed. Rep. 383). A receiver will not be appointed when the suit is upon a mere question of legal right (Rollins v. Henry, 77 N. C. 469), or when the party can assert his right by a direct action at law. A receiver will not in general be appointed where the creditor may have execution and recover his debt by sale of the debtor's property (Parker v. Moore, 3 Edw. N. Y. 234).

Plaintiff, to obtain a receiver. must show he has a clear right to the property, or that he has some lien upon it, or that the property constitutes a special fund for the satisfaction of his claim.

Receiver's control over property: A receiver is entitled to take possession and control of property or funds involved, and to manage and dispose of the same under the directions of the appointing court (Miller v. Jones, 39 Ill. 54). He cannot turn over the control

and management to another (Shadewald v. White, 74 Minn. 208). The mere order of appointment does not constitute actual possession of the property (Woodland Bank v. Heron, 120 Cal. 614). Property in the receiver's hands is exempt from judicial process as a rule, except as permission can be given by the appointing court (Jackson v. Lahee, 114 Ill. 287).

A receiver has no authority in any state or country other than that in which he was appointed, and his authority will not be recognized elsewhere (Booth v. Clark, 17 How. 322, 330). He is incompetent to sue in a foreign jurisdiction, just as an executor or administrator appointed in one state has no authority to bring suit in any other. Some cases, however, have held to the contrary (High on Receivers, Sec. 241).

Bond instead of receiver: Where the person in possession of property or receiving rents from property offers to execute a bond to secure the person seeking a receiver from any loss pending the suit, a receiver will not as a rule be appointed (Devereaux v. Fleming, 47 Fed. Rep. 177).

In Illinois, before a receiver is appointed, the applicant must give bond to the adverse party, conditioned to pay all damages, including attorney's fees, sustained by reason of the appointment and acts of the receiver, in case the appointment is revoked or set side. The court, however, may for good cause, and upon notice and hearing, appoint a receiver without such bond (Ill. Stat. Chan., Receivers, Sec. 1). Also in Illinois in lieu of appointing a receiver, the court may permit the party in possession to retain possession upon giving bond; and the court may remove a receiver and restore the property to the possession of the original possessor upon the giving of a like bond (Ill. Stat. Chan., Receivers, Sec. 2).

Receivers of corporations: A court, as a rule, will not by a receiver take the control and management of the corporation out of the hands of its officers and directors (Ranger v. Champion Cotton Press Co., 52 Fed. Rep. 609); but if a corporation is insolvent and has suspended operations, a receiver may be appointed

to protect its creditors and stockholders (McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 262). Also, when a corporation is dissolved and has no place of business and no officers to attend to its business, a receiver may be appointed to preserve the assets (Midland Co. v. Anderson, 63 Ill. App. 51). By the appointment of a receiver the corporation is deprived of the right to exercise its powers only to the extent that the decree of the court transfers such powers to the receiver (Ohio R. Co. v. Russell, 115 Ill. 52).

Get leave to sue receiver: The rule is that in the absence of a statute to the contrary no suit can be brought against a receiver without permission from the appointing court (Barton v. Barbour, 104 U. S. 126; Mulcahey v. Strauss, 151 Ill. 70). It rests in the discretion of the court to allow a party to bring an independent action against the receiver, or to compel him to proceed in the suit in which the receiver was appointed (Mechanic's Nat. Bank v. Landauer, 68 Wis. 44). Leave to sue a receiver is granted as a matter of course, unless it is clear that there is no foundation to the claim (Hills v. Parker, 11 Mass. 508). Failure to obtain leave of court before suing a receiver is merely an irregularity, which, though punishable as a contempt, may be cured or waived at any stage of the proceedings (Holbrook v. Ford, 153 Ill. 633; DeGroot v. Jay, 30 Barbour N. Y. 483).

The plaintiff in such action only renders himself liable to have his proceedings stopped by the appointing court on the application of the receiver, by action against the plaintiff personally (Lyman v. Central Vermont R. Co., 59 Ver. 167).

Inasmuch as the receiver is an officer of the court, any unlawful interference with him in the performance of his duties, or in his possession of the property, is deemed a contempt of the court, and will be punished as such (*In re* Higgins, 27 Fed. Rep. 443; St. L., A. & S. R. R. Co. v. Hamilton, 158 Ill. 366).

NE EXEAT.

When a proper bill is filed, or upon petition in a suit already begun, if it is made to appear satisfactorily to the court that the defendant intends quickly to depart from the State or from the United States; that there is due from him a sum certain or ascertainable; that complainant has no sufficient legal redress, and that irreparable injury or a failure of justice will be caused to complainant if the defendant so departs, such court may order the writ of *ne exeat* to issue, upon which the sheriff or marshal arrests the defendant and keeps him in custody, unless he gives security, to abide the order and decree of the court (Griswold v. Hazard, 141 U. S. 260).

(As to power of Master to issue writ of *ne exeat,* see Bassett v. Bratton, 86 Ill. 152; also Ill. Stat., "Masters in Chancery;" also Cook County Chancery Rules of Circuit and Superior Court, Rule 6.)

In Illinois, by statute, writs of *ne exeat republica* are granted as well in cases where the debt or demand is not actually due, but exists fairly and *bona fide* in expectancy, at the time of making application, as in cases where the demand is due; and it is not necessary, to authorize the granting of such writ of *ne exeat,* that the applicant should show that his debt or demand is purely of an equitable character, and only cognizable before a court of equity. In case of joint obligors or debtors, if one or more of them be about to remove beyond the state, taking property with them, leaving one or more co-obligors or co-debtors bound with them to pay a sum of money or to convey certain property at a certain time, which time shall not have arrived at the time of such intended removal, then such co-obligor who remains is entitled to a writ of *ne exeat* to compel the co-obligor who is about to remove to secure performance on his part. Also, in cases of surety, the writ of *ne exeat* may issue, on application of a surety, against the principal or co-security, when the obligation or debt shall not yet be due, and

the principal or co-security is about to remove out of the state.

Bill or petition—Bond—Suit on: No writ of *ne exeat* will be granted in Illinois except upon bill filed, and upon affidavit. Upon the granting of any such writ, the court indorses upon the bill or petition in what penalty bond and security shall be required of defendant. The court also takes of the complainant, before the writ shall issue, bond, with good and sufficient surety, in such sum as the court may deem proper, conditioned that the said complainant will prosecute his bill or petition with effect, and that he will reimburse to the defendant such damages and costs as he may wrongfully sustain by occasion of the said writ. If any defendant to such writ of *ne exeat* shall think himself aggrieved, he may bring suit on such bond; and if, on trial, it shall appear that such writ of *ne exeat* was prayed for without a just cause, the person injured may recover damages, to be assessed as in other cases on penal bonds.

Form of writ—Temporary departure no breach: In Illinois the writ of *ne exeat* contains a summons for the defendant to appear in the proper court and answer the bill; and upon the writ being served defendant must give bond, with security, in the sum indorsed on such writ, conditioned that he will not depart the state without leave of the court, and that he will render himself in execution to answer any judgment or decree which the court may render against him; and in default of giving such security, he may be committed to jail, as in other cases, for the want of bail. No temporary departure from the state will be considered as a breach of the condition of the said bond, if he returns before personal appearance be necessary to answer or perform any judgment, order or decree of said court (Ill Stat. *ne exeat*).

PARTIES.

WHO ARE DEEMED PARTIES.

The parties to a suit in equity are those only who are named in the bill as such; plaintiffs in the introduction, and defendants, those described as such and against whom process is prayed. The capacity in which one sues or is sued should be stated; but if the party be actually before the court, a misdescription as to the right under which he claims may be disregarded as surplusage. While some persons, not parties to the record, may in the course of the proceedings become parties, in the sense that they may be heard on petition or motion, the court will not look out of the record for the parties, and one not named as a party cannot inject himself into a suit by pleading to the bill and thereby claim the rights of a party (16 Cyc. 195).

GROUPING AS PLAINTIFFS OR DEFENDANTS.

The grouping of parties as plaintiffs or defendants is of less importance in equity than at law. If the requisite of a proper plaintiff exists, it is sufficient if all persons interested be before the court, regardless of their position or grouping as plaintiffs or defendants. The court will, when occasion demands, transpose a party from one side to the other, or it may proceed to decree without making the formal change (16 Cyc. 196). One who should be a co-complainant, but refuses to join as such, should be made a defendant (Whitney v. Mayo, 15 Ill. 251).

PLAINTIFFS.

In order to sustain his suit, plaintiff must show he has an interest in the subject-matter of the suit and in obtaining the object of the suit, and a bill is demurrable which fails to show such interest. A suit in equity cannot be brought in the name of one party for the use of another. It must be brought in the name of the real party in interest (Elder v. Jones, 85 Ill.

384). All who are united in interest and entitled to the relief sought should be joined as plaintiffs, unless a reason be shown for their not being joined, such as their great number, etc. Parties cannot be joined as plaintiffs who have conflicting interests (16 Cyc. 198). If, among plaintiffs, there be one not entitled to relief, the objection should be cured by dismissing the bill as to such plaintiff. If one not made a party files an intervening petition, disclosing an interest in the subject-matter of the suit, plaintiff must amend his bill and make the petitioner a party, if such interest is to be settled in the suit.

DEFENDANTS.

Defendants should be all necessary parties, except those who are plaintiffs, and except such dispensable parties as are omitted for reasons shown in the bill; as, for instance, that they are without the jurisdiction of the court, or cannot be joined without ousting the jurisdiction as to the other parties; and defendants may include, also, such proper parties as plaintiff may see fit to join (Cyc. 199).

Parties depend on the nature of the controversy, on the relief sought, on the subject-matter, and upon the aim of equity courts to determine the whole controversy in one suit, if practicable (Vol. 16, Cyc. 183).

They may be divided into three classes:

1. *Necessary and indispensable parties,* having interests such that any decree made in the suit will affect such interests. The courts are powerless to proceed without such parties.

2. *Necessary but dispensable parties,* having interests such that the controversy cannot be completely determined without them, but still such a distinct interest that some kind of a decree can be entered which will not affect such interest. The court has discretion to refuse to proceed without such parties, but it will in its discretion proceed without them, as follows: (a) When it is impossible to bring them in, or when the delay and inconvenience of bringing them in would defeat justice. (b) Where parties are very numerous

or some are not yet in existence, if the interests of those not made parties, are properly represented by similarly interested parties actually in court subject to the jurisdiction who defend the suit, then a decree can be rendered without such parties according to the doctrine of representation (Hale v. Hale, 146 Ill. 227). Even a future contingent interest may be thus represented (McFall v. Kirkpatrick, 236 Ill. 306). (c.) The court may proceed without parties beyond the jurisdiction, if the decree can be complete as to the parties within the jurisdiction and not harm those without. (d) If the bill shows parties are unknown after the exercise of diligence to ascertain them. (e) If a party supposed to be interested disclaims such interest.

3. *Unnecessay, but proper parties,* being such as have no interest in the controversy between the immediate litigants, yet have such an interest in the subject-matter of the suit as may conveniently be settled in the suit. It is optional with the plaintiff to omit or to join such parties.

PARTIES IN EQUITY.

- PARTIES.
  - 1. Necessary and indispensable parties.
    - Having interest such that any decree made in the suit will affect such interest.
    - Court powerless to proceed without such parties.
      - 1. When impossible to bring them in, or when delay and inconvenience of bringing them in would defeat justice.
  - 2. Necessary but dispensable parties.
    - Having interest such that controversy cannot be completely determined without them, but still such a distinct interest that some kind of a decree can be entered which will not affect such interest.
    - Court has discretion to refuse to proceed without such parties, but will in its discretion proceed without them:
      - 2. Where numerous parties have common interest, one or more may sue or defend for all the others similarly situated.
      - 3. Court may proceed without parties beyond the jurisdiction if decree can be complete as to parties within the jurisdiction, and not harm those without.
      - 4. If bill shows parties are unknown after exercise of diligence to ascertain them.
  - 3. Unnecessary but proper parties.
    - Having no interest in the controversy between the immediate litigants, but having an interest in the subject-matter of the suit, which may conveniently be settled in the suit.
    - Optional with plaintiff whether he omits or joins such parties.
      - 5. If party supposably interested disclaims such interest.

When the complainant desires to obtain from a corporation the answer of some officer of the corporation under oath, such officer must be named and made one of the defendants in the bill (Buford v. Rucker, 4 J. J. March 551).

OBJECTIONS AS TO PARTIES.

The objection that a party has been misjoined as a defendant, when he should have been joined as a plaintiff, or *vice versa,* is often disregarded, because, in equity, it is not always important. But the objection that there has been non-joinder of a necessary and indispensable party may be raised, in any manner, at any time, as on the hearing or on appeal, and it goes to the jurisdiction. The court may of its own motion raise and act upon the objection. Not so the objection that necessary, but dispensable, parties were not joined. Such objection must be raised by demurrer, plea or answer, in which the proper omitted parties must be pointed out, not by name, if that is impossible, but in such manner as to indicate the precise objection and enable plaintiff to amend (16 Cyc. 207).

CURING DEFECTS AS TO PARTIES.

If doubt exists whether the court will grant a final decree by reason of the absence of parties, the question should, if possible, be presented and settled before incurring the delay and expense of taking testimony.

Where a co-partnership or association other than a corporation is a party, the names of the individuals must be set forth, because it is not permissible to use the firm name (The Protector, 11 Wall. 82; Chapman v. Barney, 129 U. S. 677). And the given names of the parties in all cases should be used instead of the initials (Monroe Cattle Co. v. Becker, 147 U. S. 47).

(Sec. 13, Ill. Practice Act:) "A co-partnership, the members of which are all non-residents, but having a place or places of business in any county of this state in which suit may be instituted, may be sued by

the usual and ordinary name which it has assumed and under which it is doing business; and service of process may be had in such county upon such co-partnership by serving the same upon any agent of said co-partnership within this state."

Sec. 17, Ill. Practice Act:) *Joining name of co-plaintiff who refuses to join—Title:* "If any person necessary to be joined as plaintiff in any suit or proceeding shall, upon request, not consent to join therein, his name may, nevertheless, be used by the other party plaintiff, upon filing with the clerk of the court an obligation, with good and sufficient sureties, to be approved by a judge or the clerk of the court in which the suit or proceeding is to be commenced, shown by his indorsement of approval thereon, to protect, save harmless and indemnify the person whose name is so used from the payment of any costs, judgment or expenses in said suit. If, however, the plaintiff shall recover a judgment in such suit or proceeding, the person so refusing to allow the use of his name shall not be entitled to receive any part thereof until he pays the expense incurred in giving the obligation and his equitable share of the costs and expenses of the litigation, including plaintiff's attorney's fees, and discharges the obligation."

Plaintiff may sometimes avoid the necessity of bringing in a party by waiving his claim against him. So, one who should be defendant may authorize the court to proceed without making him a formal party, by stipulating to that effect, or by appearing voluntarily and answering the bill. While the court may dismiss a bill without prejudice for want of necessary parties, this course will not be adopted except in the case of omission of indispensable parties who cannot be brought in, or in case parties have been omitted wilfully and in bad faith, or, perhaps, where a weak case is presented on the merits. The proper course in case of misjoinder is to amend by dismissing as to the one improperly joined. Where the defect is a non-joinder of necessary parties, the suit is merely suspended. The court should not proceed until the absent

parties are before it, but the proper order is for the cause to stand over, with liberty to amend by adding new parties, and if that be not done within the time fixed, that the bill be then dismissed. An appellate court will not reverse a decree for want of parties who ought to have been joined, provided sufficient parties were before the court to sustain the decree as rendered; and where the decree cannot be sustained, the court will, generally, instead of dismissing the bill, remand it to the court below, that the omitted parties may be brought in (16 Cyc. 207).

Section 6 of the Illionis Chancery Act provides that a guardian *ad litem* shall be appointed to act for infants or insane defendants, who shall receive such reasonable sum for his charges as shall be fixed by the court.

Practice in U. S. courts in obtaining jurisdiction over parties not found within the district. When in any suit in equity, commenced in any court in the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants is not an inhabitant of or found within the district, or does not voluntarily appear, the court may enter an order directing such absent defendant to appear, plead, answer or demur to the complainant's bill on a day therein designated. This order must be served on such absent defendant, if practicable, wherever found; or, where such personal service is not practicable, the order must be published in such manner as the court directs. In case such absent defendant does not appear, plead, answer or demur within the time limited, or within some further time to be allowed by the court in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it is lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but such adjudication, as regards such absent

defendant without appearance, affects only his property within such district (Sec. 13 U. S. Statute, in force June 1, 1872).

FORMS.

FORMS OF BILL.

I. The Address.

(In the Circuit Court of the United States.)

To the Judges of the Circuit Court of the United States for the District of .....

(In Illinois.)

To the Honorable Judges of the Circuit Court of the County of ....., in the State of Illinois, in Chancery sitting.

II. The Introduction.

(By a complainant under no disabilities.)

Introduction.

A. B., a citizen of the state of....., residing in..... County in said state brings this bill against C. D., a citizen of the state of....., residing in.....County in said state, and E. F., a citizen of the state of....., residing in.....County, in said state; and complains and avers as follows:

Note. From the fact that the courts of the United States are of limited jurisdiction and in some cases suits must be brought in the district where the defendant resides, and from the fact that in Illinois under the Chancery Act the defendants must be sued in the county where they reside, it follows that the existence of jurisdiction should be made plain upon the face of the record in each case, or the bill will be demurrable, or may be dismissed by the court on its own motion. This can be accomplished by stating the citizenship, naming the county of which the defendants are residents. U. S. Equity rule 20 requires the introduction to be as above, and therefore it should for the sake of simplicity be adopted in other jurisdictions.

(By an infant by his father and next friend.)

Your orator, A. B., of the county of ....., an infant, by E. B., of the same county, his father and next friend, respectfully represents unto your honor that, etc.

(By a corporation.)

Your orator, the ..... Company, a corporation duly established by the laws of the State of ....., respectfully represents unto your honor that, etc.

III. The Premises or Stating Part.

That, etc. (Here insert all the facts constituting complainants' rights, and all the facts constituting the defendants' duties and violation of the complainants' rights. (See text ante "stating part of bill").

IV. The Confederating Part.

(This part should be omitted.)

That the said C. D., combined and confederated with E. F. and G. H., and with divers other persons, at present unknown to your orator, whose names, when discovered, your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto;

V. Charging Part.

(This part of the bill may also be omited, unless pleader desires to anticipate the defenses and to meet them with counter-charges.)

That the defendant sometimes alleges and pretends (stating the supposed ground of the defense), and at other times he alleges and pretends, etc.; whereas, your orator charges the contrary thereof to be the truth, and that (stating the special matter with which the plaintiff meets the defendant's supposed case).

VI. Jurisdictional Clause.

(This clause should be omitted, as unnecessary.)

Your orator further avers that the said rights of your orator are remediless, according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable.

or,

Forasmuch as your orator is without remedy except in a court of equity and, and

VII. Interrogating Part.

(General interrogatory.) To the end, therefore, (or, your orator prays) that the defendants hereinafter named may make full, true, direct and perfect answers (but not under oath, answer under oath being hereby waived) to all the matters herein stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated; and that not only as to the best of their respective knowledge and remembrance, but also according to the best of their respective information and belief.

(Special interrogatories) and more especially, that they may answer and set forth.

1. Whether, etc. (Here follow interrogatories to be answered by the defendant.)

2. Whether, etc.

VIII. Prayer for Relief.

And (or, your orator prays) that upon the final hearing of this cause it be ordered and decreed, among other things that (here state the particular relief asked);

And that your orator may have such other and further relief in the premises as may be just and equitable.

IX. Prayer for Process.

(prayer for summons.)

May it please your honor to grant the writ of summons in chancery, directed to the sheriff of the said county of ....., commanding him that he summon the defendant, C. D., to appear before the said court, on the first day of the next ..... term thereof, to be held at the court house in ....., in the county of ....., aforesaid, and then and there to answer this bill, etc.

(prayer for subpoena, in U. S. Court.)

May it please your honor to grant unto your orator the writ of subpœna of the United States of America, issued out of and under the seal of this honorable court, to be directed to the said C. D., and thereby commanding them, and every one of them, at a certain day and under a certain penalty, therein to be specified, personally to be and appear before this honorable court, and then and there to answer all and singular the premises (but not under oath except in response to the special interrogatories above, otherwise answer under oath is hereby expressly waived) and to stand to, perform and abide such order and decree therein, as to your honor shall seem meet.

In the older forms the jurisdictional, interrogatory, relief and process clauses, form one grammatical sentence: Thus;

Forasmuch as your orator is without relief except in a court of equity, and

To the end that said defendant may answer this bill, and

That the court may decree that said defendant, among other things, come to a just account, etc., and that your orator may have such other and further relief as may be equitable;

May it please your honor to grant unto your orator the writ of subpœna, etc.

Thus, the interrogatory part is as much entitled to be called a prayer for answer as the relief clause is to be called a prayer for relief. They recite the object or purpose for asking process.

In modern bills, the jursdiction clause is omitted and answer and relief are each directly prayed for. Thus;

Your orator therefore prays that said defendant answer this bill, etc.

And your orator prays that said defendants among other thiugs, come to a just and true account with your orator, etc.; and that

your orator may have such other and further relief as may be equitable.

PRAYER FOR INJUNCTION.

(After the prayer for summons or subpœna as in the two last forms, add the following:)

And may it please your honor to grant unto your orator the people's writ of injunction, to be directed to the said C. D., restraining him, his employes and agents, etc. (here insert the matter sought to be enjoined), until the further order of said court.

CHANCERY SUMMONS.

STATE OF ILLINOIS, } ss.
COOK COUNTY, }

The People of the State of Illinois. To the Sheriff of said County, Greeting:

We command you that you summon.....
.....if he shall be found in your county, personally to be and appear before the.....Court of Cook County, on the first day of the term thereof, to be held at the court house, in Chicago, in said Cook County, on the first Monday of..... next, to answer unto.....
in.....certain.....Bill of Complaint.....
filed in said Court, on the Chancery side thereof.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness,.....Clerk of our said Court, and the Seal thereof, at Chicago, in said County, this.....day of .....A. D. 19...

.....Clerk.

FORM OF A GENERAL DEMURRER.

In the ..... Court.
..... Term, 190...

A. B. } In Chancery.
vs. } Gen. No.
C. D. }

The demurrer of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained, to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demurrer shows, that, etc.

(Here set forth the special cause of demurrer.)

Also that the complainant has not, in and by his said bill, made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching any of the matters contained in the said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant demurs to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he prays to be dismissed with his reasonable costs in this behalf sustained.

.....

By ....., Solicitor for Defendant.

FORM OF PLEA.

In the ..... Court.

..... Term, 190...

A. B. vs. C. D. } In Chancery. Gen. No.

The plea of C. D., defendant, to the bill of complaint of A. B., complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill mentioned, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea says, that, etc. (Here set forth the subject-matter of the plea, and conclude as follows:) All which matters and things this defendant avers to be true, and pleads the same to the whole of the said bill, and demands the judgment of this honorable court whether he ought to be compelled to make any answer to the said bill of complaint; and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

.....

By ....., Solicitor for Defendant.

(If the plea is of matters of fact, and not of jurisdiction, add affidavit.)

(NOTE.) SIGNING OF PLEA. A plea must be signed by the party, as well as counsel; but where it is not sworn to, the signature of counsel is sufficient.

When plea must be sworn to. A plea in bar of matters of fact must be sworn to; but pleas to the jurisdiction of the court or disability of the person of the complainant, or pleas in bar of any matter of record, or of matters recorded, as of a record in the court itself, or any other court, need not be on oath. (1 Barb. 117).

In all cases where a plea is accompanied by an answer, it must be put in upon oath. A plea must be verified by oath, although the complainant has expressly waived an answer from the defendant on oath. If it is not sworn to, the complainant may, if application is made in apt time, have it stricken from the files, but the application must be made before the argument of the plea.

FORM OF ANSWER.

(NOTE.)—An answer always begins with its title, specifying of which of the defendants it is the answer, and the names of the complainants in the suit in which it is filed as an answer. It is irregular, and may be rejected, if it is not properly entitled, and does not show what bill it purports to answer.

I. THE TITLES OF ANSWERS.

(Title of answer by one defendant.)

The answer of C. D., the defendant, to the bill of complaint of A. B., the complainant.

If the defendant was misnamed in the bill, he may in the body of his answer correct it thus: the answer of Walter Holden (in the bill by mistake called Willie Holden). Atty. Gen. v. Worcester, 1 Coop. t. Cott. 18.

(Title of answer to amended bill.)

The answer of C. D., the defendant, to the amended bill of complaint of A. B., the complainant.

(Title of answer where exceptions have been taken to a form of answer, and the bill has also been amended.)

The further answer of C. D., one of the defendants to the original bill, and his answer to the amended bill of complaint of A. B., the complainant.

(Title of amended answer.)

The amended answer of C. D., the defendant, to the bill of complaint of A. B., the complainant.

(Title of answer by infants by their guardian *ad litem*.)

The answer of C. D., an infant under the age of twenty-one years, by E. F., his guardian *ad litem*, to the bill of complaint of A. B., the complainant.

II. THE COMMENCEMENT OF AN ANSWER.

(Introduction to an answer of one defendant.)

This defendant, now and at all times hereafter, saving to himself all manner of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to such parts thereof as are material or necessary for him to make answer unto, says etc.

III. COMMON FORMS IN FRAMING ANSWERS.

And this defendant, further answering, says that he has been informed and believes it to be true, that, etc.;

or,

This defendant admits that, etc.;

or,

This defendant, further answering, denies, etc.;

or,

This defendant, further answering, says that he is ignorant of and does not believe, and therefore denies that, etc.

IV. Conclusion of Answer.

And this defendant denies all other matters, causes or things in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct.

And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint; and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

C. D.

....., Solicitor for Defendant.

(If answer is required to be under oath, the following affidavit should be attached:)

AFFIDAVIT TO ANSWER.

State of }
County of ..... } *ss.*

On this ..... day of ....., 19..., before me personally appeared C. D., and made oath that he has read (or heard read) the above answer, subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters, he believes them to be true.

Subscribed and sworn to before me this.....day of.....19..

.....,

Clerk of the ..... Court.

The answer must be signed by the defendant putting it in, unless leave has been obtained to file an answer not signed, because originally the answer was always under oath and was testimony in the cause. (Dennison v. Bassford, 7 Paige 370). The answer must also be signed by counsel. When such counsel are a firm, the firm signature may be used. (Bishop v. Willis, 5 Beav. 83 n). The signing of the answer by the defendant may be waived by the complainant, and if an unsigned answer is put in and the complainant files a replication, that step on his part will be held to be such a waiver. (Fulton Bank v. Beach, 2 Paige 307). The court, under

special circumstances will permit the defendant to file an answer not signed by him as when he resides at a distance, or has gone abroad before an answer could be prepared or the like. (Dumond v. Magee, 2 Johns. Ch. 240). The answer of a corporation is put in under the corporate seal and not under oath. If it is put in not under seal it will be taken from the files as irregular. (Ranson v. Stonington Sav. Bk. 2 Beasley, 13 N. J. Eq. 212; Supervisors v. Miss. & W. R. Co., 21 Ill. 338.) But unless the answer of the corporation is sworn to it cannot be made the basis of a motion to dissolve a temporary injunction; an injunction will not be dissolved upon the filing of an answer not on oath denying the equities of the Bill. (Fulton Bk. v. New York, etc., 1 Paige 311).

Therefore, if an injunction bill waives an answer under oath, the defendant may still put in an answer under oath and so treat it, for the purpose of moving to dissolve the injunction granted on the bill. (Doughrey v. Topping, 4 Paige 94).

If the answer must be sworn to it should be done before the proper officer. Who is such proper officer depends upon the provisions of the local statute and the rules of the court. (Sitlington v. Brown, 7 Leigh (Va.) 271).

FORM OF DISCLAIMER.

(Title of cause.)

The disclaimer of C. D., one of the defendants, to the bill of complaint of A. B., the complainant.

This defendant, saving and reserving to himself, now and at all times hereafter, all manner of advantage and benefit of exceptions and otherwise that can be or may be had and taken to the many untruths, uncertainties and imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much, or such part thereof as is material for this defendant to make answer unto, says, that he fully and absolutely disclaims all manner of right, title and interest whatsoever in and to the (here describe the property in dispute) in said bill mentioned, and in and to every part thereof.

And this defendant denies all other matters, causes and things in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct.

And this defendant, further answering, denies that the complainant is entitled, as against this defendant, to the relief, or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint; and prays to be dismissed with his

reasonable costs and charges in this behalf most wrongfully sustained.

C. D.

....., Solicitor for Defendant.

(Add affidavit, if required, as in answer.)

FORM OF GENERAL REPLICATION.

In the ..... Court.

..... Term, 190...

A. B. }
vs. } In Chancery.
C. D. }

The replication of A. B., complainant, to the answer (or, plea) of C. D., defendant.

This repliant, saving and reserving unto himself all and any manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, says: That he will aver and prove his said bill to be true, certain and sufficient in law to be answered unto; and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material, or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

.....Solicitor for Complainant.

The replication may be signed by either the complainant or the solicitor (1 Barb. 250).

JUDGE'S CERTIFICATE OF EVIDENCE HEARD IN OPEN COURT.

STATE OF
County of } ss.

In the Court of County.
To the October Term thereof, A. D. 19 .

A. } Gen. No.
-vs.- } Term No.
B. } In Chancery.

Be it remembered, and certified that on the hearing of this cause, at the above term of court, upon the bill of complaint, answer to said bill, and the replication thereto, the parties introduced the following evidence, to-wit:

To maintain the issues on his part, the complainant introduced in evidence on his behalf, as follows, that is to say: C. D., a witness produced on his part, was sworn and testified as follows: (Here insert his testimony.) And the complainant further offered in evidence *one trust deed and four promissory notes* in words and figures as follows: (*Here copy.*)

And further, E. F., a witness on the part of the defendant, was sworn and testified as follows: (*Here insert his testimony in full*). And further the defendant offered in evidence a certain *deed* in words and figures, as follows, to-wit: (*Here insert copy.*)

STATE OF }
County of } ss.

I, ..., a shorthand reporter, do hereby certify that the above and foregoing is a true and correct transcript of all the evidence taken in shorthand upon the examination of witnesses in open court, and of the proceedings had upon the hearing of this cause.

Dated this .....day of ....., A. D. 19 .

.....

Subscribed and sworn to before me, this...day of..., A. D. 19 .

.....
Notary Public.

Be it further remembered, and certified, that the foregoing was all the evidence introduced on the hearing of said cause.

And, inasmuch as the matters above set forth do not fully appear of record in said cause, the.....tenders this certificate of evidence, and prays that the same may be certified under the hand and seal of the judge of this court, and thereby made a part of the record in said cause, and it is accordingly certified and made a part of the record of said cause.

Dated this....., A. D. 19....

.....Judge.

ORDER OF REFERENCE TO TAKE PROOFS AND TO REPORT SAME TOGETHER WITH CONCLUSIONS OF FACT AND OF LAW THEREON.

(Title of cause and of court.)

This cause coming on to be heard upon motion of ..... solicitor for.....; upon consideration thereof,

It is ordered that this cause be and hereby stands referred to ....., a master in chancery of this court, to take the evidence according to law and to report the evidence to this court, together with his conclusions of fact and of law thereupon, with all reasonable speed; to examine the questions in issue in this cause and report his conclusions thereon; to report his conclusions as to whether the evidence and pleadings entitle the complainant or other parties to the relief or any part thereof prayed for in their respective pleadings, or to any other relief; and to perform all such other lawful services as may be necessary or proper under the premises. And for the better taking of the evidence all parties not in default shall introduce their evidence before said master

with all reasonable speed, and shall produce before him all books and writings in their possession or power which contain evidence pertinent to the issues and matters in reference; and said master is hereby authorized and directed to cause to come and be produced before him according to law, all proper witnesses and books and writings requested by the parties.

Dated this.....day of.....19..

..... Judge.

The above form is drafted with reference to section 39, Illinois Statute, "Chancery;" section 20, Illinois Statute, "Fees and salaries;" section 9, Illinois Statute, "Evidence;" section 6, Illinois Statute, "Masters in Chancery." It is a good form for any state or for the Federal courts, if by warrant of the statute, or by the consent of parties, the entire cause is referred to a master to take and report the evidence together with his conclusions of fact and law thereon.

(Title of cause and of court.)

ORDER OF REFERENCE TO STATE ACCOUNT.

This cause coming on for further hearing upon the bill of complaint, the answer of the defendant to said bill, the replication of the complainant thereto, and the testimony taken and reported by the Master in Chancery under a former order of the Court, and the Court having heard the arguments of counsel for the respective parties, and being fully advised in the premises, doth find, etc. (here insert the findings of the Court as to the facts and the rights of the parties and the rule adopted in stating the account). And in further consideration of the premises, it is ordered that this cause be again referred to the Master in Chancery of this Court, to take the books of account and all papers referred to in the pleadings and report herein heretofore filed, and state the accounts between said parties, taking and reporting such evidence, if any, as may be further offered by either of the parties to this suit, outside of the said books of account, documents, etc., and report the said evidence and statement of account to the Court as soon as practicable, together with his conclusions of fact and of law thereon. And for the better taking of such evidence and stating such account, the Master shall cause such witnesses as the parties may desire to appear and give evidence before him, and shall cause the parties, or either of them, to produce before him upon oath, all such deeds, books, papers and writings in their possession or power, containing evidence pertinent to the issues and matters in reference, as may be proper and as may be desired by the parties; and said witnesses are to be examined upon oral or written interrogatories as the Master shall direct.

Dated this..... day of.....19 .

..... Judge.

FORM OF ORDER OF REFERENCE AS TO ALIMONY.

(Title of court and cause.)

It is ordered that the said defendant pay to the said complainant, or her solicitor, the sum of $100, in and towards defraying the costs and expenses of this suit, and that execution may issue therefor.

It is further ordered that this cause be referred to....., one of the masters in chancery of this court, to take evidence and report his conclusion as to what would be a reasonable sum to be allowed for the support of the said complainant during this suit, and also for the support during this suit, of the children of the marriage now in her custody and charge.

It is further ordered that said master report his recommendation as to the times and manner in which the said sums should be paid to the complainant.

Dated this..... day of.....19 .

.....

Judge.

MASTER'S NOTICE OF DAY FOR EVIDENCE.

To.....

Please take notice, that by virtue of an order of reference entered in the above entitled cause, on the.....day of....., 19.., I will, at ten o'clock in the morning, on the....day of...., 19.., at my office, Room.....street, Chicago, in said County, fix a day to proceed with the taking of testimony or evidence on such reference; and on the day so fixed I shall proceed with the taking of such testimony or evidence.

Chicago, the.....day of.....19....

(Signed) .....

"Master in Chancery of the.....Court of Cook County."

MASTER'S SUBPOENA DUCES TECUM.

STATE OF
County of } ss.

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS.

To .....

.....

You are Hereby Commanded To appear before me, at my office, No.....Street, in the City of .....said County, on..... the .....day of.....A. D. 19....at..... .....o'clock.....M., then and there to testify the truth in a suit wherein..... Complainant.....,and ..... Defendant, and bring with you and then and there produce a certain (book or writing, give description of same) and all other books or writings which contain evidence pertinent to the issues in

said cause; and this you shall in no wise omit, under the penalty of the law.

Given under my hand, this.....day of.....A. D. 19 .

.....

Master in Chancery of the.....Court of..... County.

STATE OF ILLINOIS, } ss.
County of Cook. }

.....

being duly sworn, on oath, says that he served the within Writ by reading the same to and leaving a copy thereof with..... ..... on the .....day of.....19..., in said ....

Sworn to before me this.....day of.....19 .

.....

Fees:

Mileage $ .....
Service $ .....
Total $ .....

Note: For a witness subpoena, omit the part referring to bringing books and papers.

For form of suggestions as to what should be the Master's findings of fact and of law in his report, see text ante, "Master's in Chancery."

FORM OF MASTER'S REPORT OF EVIDENCE AND CONCLUSIONS OF FACT AND LAW THEREON.

(Title of court and cause, and address to the court.)

Report of.....Master in Chancery.

Pursuant to an order of reference hertofore entered herein, I, the said master, do certify and report as follows:

That upon due notice to all the parties hereto, and in due form of law, and having caused to come before me and be produced all such witnesses and books and writings as the respective parties desired and made known to me; witnesses were duly sworn and testified, evidence was heard and received, and proceedings were had as more fully appears from the record and transcript of proceedings and evidence annexed as a part of this report, which said record and transcript, together with the exhibits therein mentioned, (and together with such depositions, affidavits and other documents as were lawfully filed in said cause and were produced before me as evidence), contains all the evidence submitted before said master, in said cause. And from the competent evidence so submitted and from the confessions under the pleadings in said cause, said master

finds the following matters of fact to be true: (Here set forth the conclusions of fact found by the master.)

Upon the facts aforesaid, and from the pleadings filed in said cause, the said master finds the following conclusions of law: (Here set forth the conclusions of law found by the master.)

Said master therefore, upon the findings of fact and of law aforesaid, concludes that the equities of this cause are with the complainant, and that he is entitled to the relief prayed for in his bill, except as otherwise found herein.

All of which is respectfully submitted.

Dated this.....day of....., A. D. 19..

.....

Master in Chancery of the.....Court of Cook County, Illinois.

(Then annexed to the report follows the report, record and transcript of evidence.

(Form of Master's Report of Evidence.)

State of.....
County of..... } ss.

In the.....Court
In Chancery.

Adams et al.
vs.
Brown et al. } Gen. No. 12,860.

Report, record, and certificate of proceedings and evidence in the above entitled cause had and taken before..... Master in Chancery of said court in his office, suite.....Street, ..., on....., ...19.., at.....o'clock.....pursuant to an order of reference heretofore entered:

Present,....., Esq., representing the complainant; ....., Esq., representing.....

Mr.....: "I now file with the master a copy of the notice for this hearing showing signed receipt of notice by.....and proving by affidavit delivery of notice to.....I also file with the master, the master's writ of subpœna with the endorsement showing lawful service of same on.....and..... to testify at this meeting."

Master: Let them be placed on file.

Whereupon Mr.....called.....as a witness, who after being duly sworn by the master, testified as follows:

Mr.....: State your name, residence and occupation. A.—John Armstrong, 753 West Monroe St., Chicago, shoe merchant, etc., etc. (Here follows the testimony in the form of question and answer).

Whereupon:

Mr. H. W. Rice, of Rice and Carter:

If you are through with the direct examination, I will ask Mr. Armstrong a few questions upon cross-examination:

Q. Mr. Armstrong, please state who was present when the contract marked exhibit "D," which I hand you, was signed? A.—Mr. Carter, Mr. Brown and myself.

Etc., etc. (Here follows cross-examination, and then follows the re-direct examination).

(Signed) JOHN ARMSTRONG.

Subscribed and sworn to before me this 20th day of June, 1905.

.....

Master in Chancery of the ..... Court of Cook County, Illinois.

Whereupon Mr.....called.....as a witness, who, after being duly sworn by the master, testified as follows:

Mr.....: State your name, residence and occupation.

Etc., etc.

.....

(Signed and sworn to as above).

MASTER'S CERTIFICATE OF EVIDENCE. (AT THE END OF HIS REPORT OF EVIDENCE).

I,....., Master in Chancery of the.....Court of..... county....., do hereby certify that each of the witnesses aforesaid, before testifying, was by me first duly sworn or affirmed according to law, to testify and speak the truth, the whole truth, and nothing but the truth, in relation to the matters in reference and in answering all questions put to them; that the testimony of each of them was reduced to writing, and, after being read over by each of them, the same was duly subscribed and sworn to or affirmed by each of said witnesses, as shown by the several jurats thereto attached; and, where no such signatures and jurats or affirmations appear, the signatures and jurats or affirmations thereto were waived by all the parties.

And I further certify that the foregoing record and transcript of the evidence of said witnesses, together with the exhibits hereinbefore referred to and attached, is a full, complete and true transcript of all the proceedings and evidence taken before me in said cause.

Dated this.....day of....., A. D. 19..

.....

Master in Chancery of the Superior Court of Cook County.

FORM OF MASTER'S CERTIFICATE OF FEES.

STATE OF
County of } ss.

In the.....Court in Chancery.

.....
vs. } Gen. No.....
.....

MASTER'S CERTIFICATE OF SERVICES, FEES AND CHARGES.

I HEREBY CERTIFY that I performed the following items of services and necessarily made the following expenditures under the special

order of reference heretofore entered in the above entitled cause, and that such services necessarily consumed the following amounts of my time:

Services in taking and reporting testimony.

FEES FIXED BY STATUTE.

I have taken and reported.....folios of 100 words each, at 15 cents,.....$.....

Stenographer's services.

I hereby certify that a stenographer was necessarily employed and that said stenographer reported.....folios of 100 words each....$.....

Statutory services known as "not enumerated by statute;" imposed by the special order of reference herein.

(Ill. Stat.: "Fees and Salaries," Sec. 20.)

FEES TO BE ALLOWED BY COURT.

(1) Time spent by Master in hearing and granting motions for continuance.....hour's time at $.....per hour.....$.....

(2) Time spent ....days, at $....per day,.....hours, at $.....per hour, in hearing arguments, ...$.....

(3) After the report was made, time spent.....days, at $.....per day,.....hours, at $.....per hour, in hearing and considering objections to the report herein,.....$.....

Services examining questions in issue, and reporting conclusions thereon.

(4) Time spent.....days, at $.....per day, ...hours, at $.....per hour, in reading briefs and authorities presented, in determining and formulating findings of fact, and in determining and formulating conclusions of law, and in drafting the report herein,.....

Default case, finding and reporting conclusions.

I respectfully ask the Court to allow, tax and fix the above charges.

DATED, this.....day of....., 190 .

.....

Master in Chancery of the.....Court of .....County, Illinois.

The above charges are hereby allowed, taxed and fixed as costs, as and for the master's fees and charges under the order of reference herein.

.....

Judge.

ORDER DIRECTING MASTER'S FEES TO BE PAID.

STATE OF
County of } ss.

In the.....Court.
In Chancery.

A. } Term No.....
vs.
B et al. } Gen. No.....

And now comes....., the master to whom this cause stands referred, ...and it appearing to the Court that due notice has been given to the solicitors of complainant and defendant herein, on motion of said Master.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That complainant A. and defendant B are each primarily liable to advance and pay to said Master one-half of his fees and charges, amounting to $....., heretofore allowed and taxed, and said complainant and said defendant are hereby ordered to pay to said Master within five days the sums primarily due from them to said Master as aforesaid, and this without prejudice to the final awarding of costs herein. If either of said parties fails to pay his respective share according to this order within five days, the other party may advance the defaulting party's share; whereuupon, and in case both parties default in respect to this order, the Court will enter such further order and decree as may be just and proper under the circumstances.

Dated this.....day of.....19..

.....
Judge.

PLAN OF MASTER'S FORECLOSURE REPORT.

1. Examine pleadings to see if bill is traversed.
2. Examine summons and returns therein for parties actually subject to the court's jurisdiction for caption of report.
3. Study testimony and examine exhibits.
4. Dictate report—finding as facts only things proved by *testimony or exhibits*; facts not proved before Master but confessed by default, can be included in "i" herein.

(a) Find facts as to note and interest notes as alleged in bill; if bill is slovenly, find facts from original note.

(b) Find facts as to execution, delivery, acknowledgment and recording of trust deed, as alleged in bill; if bill is slovenly, from original trust deed or mortgage.

(c) Find facts as to provisions of trust deed, either as alleged in bill, *or quote* from the trust deed. If quoted, preface the following form:

That said trust deed among other things contains the following words, figures and provisions:

" .....
" .....
" .....

Always state provision as to release and waiver of homestead; the bill often omits this. The provisions of the trust deed cited should cite from the T. D., also the covenants, if any are broken, penalties, if any are incurred, other rights, if any are violated, solicitor's fees, etc., and the defeasance clause.

NOTE: A properly acknowledged conveyance like a trust deed or mortgage or certified copy thereof, is, without further proof of execution, *prima facie* evidence, and, of itself, proves all facts under a, b and c, above. (Ill. Stat. Conveyances, Sec. 20). It can be overcome only by a sworn pleading denying execution of the instrument, (Dean v. Ford, 180 Ill. 309) and upon proof sufficient to destroy this *prima facie proof.* (Wolcott v. Lake View B. & L., 59 Ill. App. 415.)

(d) Find facts as to who is the legal owner of the principal and interest notes at time when bill was filed and up to time of report.

NOTE: Possession of note and mortgage is strong presumptive evidence of ownership. (Lambert v. Hyers, 22 Ill. App. 238; Dumlop v. Lamb, 182 Ill. 319.)

(e) Find facts as to payments by defendant. Note and mortgage are *prima facie* evidence of amount due. (Dorn v. Ross, 177 Ill. 225; Ording v. Burnet, 178 Ill. 28.)

(f) Find facts as to defaults by defendant in failing to comply with provisions of T. D.

(g) Find facts as to expenditures by complainant, for taxes, insurance, etc., etc., on account of default therein by defendant, and find as to "cash advanced for abstract continuation in order to properly begin this suit," and whether justified by the provisions of the T. D.

(h) "That there is due from said..... to said.....on account of the provisions of said notes and trust deed and on account of the foregoing, the sum of $ .....as appears from the following items:

(Make tabular statement of amounts due.)

Principal note No. 1 due Aug. 1, 1908	$.....
Interest thereon at .....per cent. from..... to.....	.....
Interest note due Feb. 1, 1908.	.....
Interest thereon at.....per cent. from..... to.....	.....
Interest note due Aug. 1, 1907.	.....
Interest thereon at.....per cent. from..... to.....	.....
Jan. 7, 1908, cash advanced for taxes 1906	.....
Interest thereon at..... per cent. from Jan. 7, 1898, to.....	.....
Feb. 10, 1898, cash advanced for insurance,	.....
Interest thereon at..... per cent. from Feb. 10, 1898, to.....	.....

Mar. 7, 1898, cash advanced for
continuance of abstr. of title .....
Interest thereon at..... per cent. from
Mar. 7, 1898, to..... .....
.....

Total. $ .....

(Note: The Illinois statute requires interest to be calculated according to the "six per cent. method," a month being one-twelfth of a year and a day one-thirtieth of a month.) Ill. Stat. "Interest."

"Also the further sum of $.....incurred by said.....as his solicitors' fees herein, which sum last aforesaid is the sum expressly provided for in said trust deed, and said master finds the same to be a just and customary fee for the services rendered by complainant's solicitor herein; (or, if the trust deed provides for a 'reasonable' fee, 'which sum said master finds from the evidence to be a reasonable charge for the services performed by the complainant's solicitor')."

(i) Said master further finds and concludes that in law and in fact said complainant,.....has a lien on the premises aforesaid for the amounts found to be due him as aforesaid; that each and every material allegation in complainant's bill, except as otherwise found in this report, is admitted by the pleadings to be true (or) is by default taken and confessed as true herein; that the equities in this cause are with said complainant,....., and that he is entitled to the relief prayed for in his said bill so far as the same is consistent with this report.

Said master therefore recommends that the usual and regular decree of foreclosure and sale be entered herein in accordance with this report.

Dated this.....day of....., 19.....

.....

Master in Chancery of the.....Court of.....County, Illinois.

Plan of Master's Report of Building and Loan Association Foreclosure.

Note carefully if evidence supports following findings:

Finding that.....Association is a corporation organized and doing business under the law of Illinois, that C. D. being a member of said association and the holder and owner of..... shares of the capital stock of said association, made, executed and delivered his certain.....bond (or agreement) in "words and figures as follows": (quote bond in full) and also executed and delivered the certain trust deed mentioned in said bond at the time and in the manner as set forth in complainant's bill.

Finding as to acknowledgment and recording of trust deed.

That the trust deed, mentioned in said bond, among other things contains the following words and figures: (quote covenants, penalties and rights in question, also defeasance clause, release and

waiver of homestead clause, solicitors fee clause, other expenses clause, etc.

That....., at the time of filing the bill herein and up to this day was and is the legal holder and owner of said bond.

That said C. D. made the payments mentioned in said bond until the.....day of.....19 ; that the amount of dues paid on his shares of stock is $ .....; that said C. D. made default in the payment of the certain installment of dues, interest and premium aforesaid, which became due on the.....day of.....and in said default continues to this day.

That on the.....day of.....said association through its board or directors duly passed a resolution in words and figures as follows:

("*Quote resolution* declaring default and amount due, or forfeiture, and authorizing suit.)

That between (give date) the last day C. D. paid money as aforesaid and .... (give date of resolution) .... (give number of installments of premium and interest became due to said association from C. D.

Find facts as to defaults in the payment of taxes, and amounts, with dates, paid therefor by complainant association.

Find facts as to defaults in the payment of insurance and the amounts, with dates, paid therefor by complainant association.

If T. D. provides for specific recovery of money laid out for abstract of title, find that a continuation of abstract of title was necessary for purposes of this suit and the amount, with date, expended for abstract continuation.

That the following are the by-laws of said association which determine and govern the withdrawal value of the shares of stock aforesaid: (quote by-laws.)

That the withdrawal value of the stock aforesaid is $..... being $ .....amount paid as dues and.....per cent. interest thereon according to said by-laws.

That the following words and figures of the by-laws of said association determine and govern the assessment and collection of fines upon the capital stock of members of said association: (quote by-laws on fines, if fines involved in cause.)

That fines amounting to $ ..... were duly and regularly assessed against said.....according to said by-laws.

That on the ..... day of ....., being the day when by the resolution aforesaid the stock aforesaid owned by said..... was forfeited and reverted to said association, the membership of said C. D. ceased, and a legal relation of borrower and mortgage creditor superceded the contract relation set forth in the bond and trust deed aforesaid, and on said last mentioned day therefore the installments of interest and premiums falling due (quarterly or semi-annually, as provided in T. D.) mentioned in said bond and trust deed, ceased to fall due as before (because of said loss of membership) and only the statutory rate of interest, 5 per cent., can thenceforward be charged to C. D. on the balance re-

maining due said association after applying all credits, including the withdrawal value of said stock on the day last mentioned.

That no share of the capital stock aforesaid has matured or reached the par value of One Hundred Dollars.

That there is due, owing and payable to said association from said C. D. on account of the bond and trust deed aforesaid and on account of the foregoing the sum of $ ..... as appears from the following items of debits and credits.

Debits.

(date of resolution)	Principal loan	$ .....
" " "	5 Int. Installments in arrears	.....
" " "	5 Premium Installments in arrears	.....
" " "	Fines assessed as aforesaid	.....
	Taxes	.....
	Insurance	.....

Credits.

Dues paid.....$.....

Int. according to by-laws .....$.....

Balance due $ .....

(Date of resolution) Balance due $ .....

Interest thereon at 5 per cent. to (date of report.)

Also the further sum of $200 as and for complainant's solicitors, etc., etc. (See plan of ordinary foreclosure report.)

NOTE: Building and Loan Association foreclosure bills are seldom correctly drawn. The plan of the master's report above stated will serve to point out what allegations the bill should contain.

FORM OF NOTICE OF DRAFT OF REPORT.

(Title of Court and cause.)

To ....., solicitor for complainant, and ....., solicitor for defendant:

Please take notice that I have prepared a draft of my report in the above-entitled cause, and objections thereto may be filed at my office on or before ....., the..... day of ....., A. D. 19.., which will be the last day for filing objections to the same; and that I shall hear argument on any objections filed on....., ...A. D. 19.., at ..... o'clock .. M., at which time and place you may appear if you see fit.

Dated ....., ..., ..., 19...

.....

Master in Chancery of the..... Court of ..... County.

For objections and exceptions to Master's report, see page 65.

FORM OF EXCEPTIONS TO MASTER'S REPORT.

(Title of Court and cause.)

Exceptions taken by C. D., the above named defendant, to the report of ....., master in chancery, to whom this cause stands referred by an order heretofore made herein; which report is dated the.....day of....., A. D. 19 :

(1) For that the master has found that, (Here insert the finding and ground of exception,) whereas he should have found that (here state finding which should have been made). See evidence, pages 16, 27, 89.

(2) For that, etc

Wherefore said ..... excepts to said report, and prays the court, upon consideration thereof, to enter an order stating what exceptions are allowed and what exceptions are overruled, and either in said order making findings or conclusions other than or additional to those contained in the report or by said order re-referring the report back to said master and directing him to file a new report and to make the certain other or additional findings or conclusions specified in such order, together with such further findings and conclusions as may be consistent with those specified in the order, and consistent with the rulings of the court upon exceptions ruled on by the court, and containing such other directions as may be equitable.

C. D., Defendant.

G. F. solicitor for defendant C. D.

FORM OF ORDER CONFIRMING MASTER'S REPORT.

(Title of Court and cause.)

This cause coming on this day to be heard on the report of.... ....., one of the masters in chancery of this Court, to whom the above-entitled cause was duly referred, which said report was filed in this Court on the.....day of....., A. D. 19..., and upon the exceptions of the defendant, C. D., to said report, and the complainant being present in open court by G. H., his solicitor, and the defendant being present in open court by J. E., his solicitor, and the Court having heard the arguments of the solicitors for the respective parties in support of and against the allowance of said exceptions and the confirmation of the said report, and having considered the same, and being fully advised in the premises,

It is ordered that the said exceptions, and each of them, be and the same are hereby overruled, and that the said report of the said master be and the same is in all things approved and confirmed.

FORM OF DECREE IN FORECLOSURE CASE. (CONTAINING ORDER CONFIRMING MASTER'S REPORT).

STATE OF ....., } ..... COURT,
County of..... } SS. IN CHANCERY.
Gen. No.....

A. B.
vs.
C. D.

This day come the complainant by.....
Solicitor, and the defendant.....
And this cause coming on now to be heard upon the bill of complaint of.....
heretofore taken as confessed by and against the defendant (name of defendant's defaulted)
the answer of the defendant.....
the answer of the.....defendant
.....
by .....Guardian *ad litem*,
and the complainant's replication to said answer, and upon the report filed herein on the.....day of.....
.....190 , and dated.....190 , of
....., the Master in Chancery to whom this cause was, by order of this Court, heretofore referred to take proofs herein and report the same to this Court, with his conclusions of fact and of law upon the evidence; and upon proofs and exhibits herein made in open Court.....
On motion of complainant's solicitor , it is ordered that said Master's report be, and the same is hereby in all things approved and confirmed, including his fees and charges, which are hereby allowed as certified by the master, and taxed as costs herein.

And the Court, being fully advised in the premises, finds that the material allegations in said bill of complaint.....
have been proved as in said bill set forth, and are true, except as otherwise found by this decree, that the equities of this cause are with the complainant, and that there was and is due to said complainant (name)
the sum of ($.....) .....Dollars,
being the amount found due by said Master's report, as more fully appears from the following items: (State items).
together with interest at five per cent per annum on said total sum from the date of said Master's report. Also the further sum of .....Dollars,
as and for complainant's solicitor's fees herein.....

And the Court further finds (state 1. findings of fact; 2. findings of law.)

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that unless the defendant .....
or some of the defendants, within two days from the date of the entry

of this decree, pay or cause to be paid to said complainant said sum of.....dollars and .....cents, with interest on $..... .....(being said total less the said sum for solicitor's fees) at the rate of five per centum per annum from the date of said Master's report to the day of such payment, and pay to the officers of this court the taxed costs in this cause; that the premises hereinafter and in said bill of complaint described, or so much thereof as may be necessary to pay the amount so found to be due the complainant with interest thereon, and the costs aforesaid, and which may be sold separately without material injury to the parties in interest, be sold at public vendue to the highest and best bidder for cash by ....., a Master in Chancery of this Court, at the Judicial Salesrooms of the Chicago Real Estate Board, No. 57 Dearborn Street, in the City of Chicago, in the County and State aforesaid; that said Master give public notice of the time and place and terms of such sale, by publishing same at least once in each week for three successive weeks in some secular newspaper of general circulation, published in the City of Chicago, County of Cook and State of Illinois, and that the complainant , or any of the parties to this cause, may become the purchaser at such sale; that upon such sale being made, said Master execute and deliver to the purchaser or purchasers a certificate or certificates of sale, evidencing such purchase, describing the premises purchased, the amount paid therefor, or if purchased by the complainant, the amount of.....bid, and the time when such purchaser or purchasers will be entitled to a deed for said premises, if the same shall not be redeemed according to law, and that within ten days from such sale he file a duplicate of such certificate or certificates in the office of the Recorder of said Cook County.

That said Master, out of the proceeds of said sale, retain his fees, disbursements and commissions according to law, and pay to the officers of this Court their costs in this cause, including $..... hereby taxed as costs for said Master's reasonable fees and charges under the order of reference herein, and out of the remainder pay to the complainant the amount by this decree found to be due..... with interest thereon at the rate of five (5) per cent per annum from the date of said Master's report to the date of such sale; and if such remainder shall not be sufficient to pay said amount and interest, that he apply the same to the extent to which it may reach in satisfaction thereof, and specify the amount of the deficiency in his report of such sale; and if said remainder shall be more than sufficient to pay said amount and interest, that he hold the suplus subject to the further order of this Court; and that he take receipt from the respective parties to whom he may have made payments as aforesaid, and file the same with his report of sale in this Court.

It is further ordered, adjudged and decreed, that upon the expiration of the statutory periods of redemption after the date of such sale, if the premises so sold shall not be redeemed according to law,

the defendants and all persons claiming under them, or any of them, since the commencement of this suit, be forever barred and foreclosed of and from all right and equity of redemption or claim of, in and to said premises or any part thereof; and in case said premises shall not be redeemed as aforesaid, then upon the production to the Master, or his successor, of the said certificate or certificates of sale by the legal holder thereof, said Master shall make, execute and deliver to the legal holder of such certificate or certificates a good and sufficient deed of conveyance of said premises; and that thereupon the grantee or grantees in such deed, or his or their legal representatives or assigns, be let into possession of said premises; and that any of the parties to this cause who shall be in possession of said premises or any portion thereof, or any person who may have come into such possession under them, or any of them, since the commencement of this suit, upon the production of said Master's deed of conveyance, and a certified copy of the order of Court confirming said sale, surrender possession of said premises to said grantee or grantees, his or their representatives or assigns.

The premises by this decree authorized to be sold are situated in the .....of .....County of Cook, and State of Illinois, and described as follows, to-wit:

.....

Examined and approved by me this.....day of..... .... 190 .

.....
Master in Chancery of said Court.

Enter .....
Judge.

MEMORANDUM OF TIME AND PLACE OF SALE AND OF CASH REQUIRED OF COMPLAINANT IF HE BIDS.

Sale, ...at 11 o'clock A. M., at.....
.....Street.

STATE OF
County of } ss.

In the .....Court.
In Chancery.

..... } Gen. No.
vs.
..... } T. No.

DECREE, INTEREST AND COSTS OF SALE.

Decree Debt.....$
Interest thereon at 5% from date of master's report to date of sale .....$
Solicitor's fee .....$
Taxed costs (including Master's report, $ .....).....$
Master's fees, disbursements and commissions:
Preparing notice of sale.....$

Publishing notice of sale.....$
Commissions on sale.....$
Certificate and duplicate of sale.....$
Recording duplicate certificate.....$
Report of sale and distribution.....$
$

Total, $

Cash at sale for Master if bid in by Complainant:
Report .....$
Expenses and commissions.....$

$

MASTER'S REPORT OF SALE AND DISTRIBUTION.

STATE OF)
County of) ss.

.....Court of..... County.
In Chancery.

A.) Term No.
-vs.-) Gen. No.
B.) Foreclosure

(Title of Court and Cause).

TO THE HONORABLE JUDGES OF SAID COURT, IN CHANCERY SITTING:

Pursuant to a decree entered in the above entitled cause on the ..... day of ....., A. D. 19 , I, ..., a master in chancery of said court, respectfully report that more than..... days having elapsed after the entry of said decree, and said defendant not having paid the whole or any part of the money by said decree required to be by him paid, I duly advertised, according to law and to said decree, the premises in said decree and hereinafter described, to be sold at public auction to the highest and best bidder therefor, for cash, at the hour of 11 o'clock in the forenoon of ....., the ..... day of ..... A. D. ....., at the Judicial Sales Rooms of the Chicago Real Estate Board, on the ground floor of the building known as No. 57 Dearborn Street, in the City of Chicago, in said County, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the Court wherein said cause was pending, and a description of the premises to be sold, and a statement of the aforesaid time, place and terms of said sale, to be published for three successive weeks immediately prior to said day of sale, to-wit: three times in....., a public secular newspaper, of general circulation, printed and published every day, in the City of Chicago, in said County. The date of the first paper containing said notice was the ..... day of....., A. D....., and the date of the last paper containing said notice was the ..... day of ....., A. D.....; a certificate of which publication is hereto attached, Marked Exhibit A.

At the time and place so designated by said advertisement for said sale, I attended to make said sale; and I offered said premises for sale at public auction to the highest and best bidder for cash. I first offered each lot of said premises for sale separately, and there were no bids upon said offer. I next offered any number of said lots less than the whole of said premises for sale in groups to suit bidders, and there were no bids upon said last-named offer. I then offered said premises for sale entire; whereupon.....
.....offered and bid therefor the sum of.....
Dollars ($.....), and that being the highest and best bid for cash therefor offered, I struck off and sold to said bidder for said sum of money the said premises which are situated in the County of Cook, and State of Illinois, and described as follows, to-wit: (Describe premises).

The amount aforesaid realized from the sale aforesaid. I have allowed, distributed, credited, paid and retained as follows:

(allowed Complainant (towards or in full of amount due on decree ($) and interest thereon ($)	$
(allowed) complainant in full of taxed costs	$
(allowed) complainant in full of solicitor's fees	$
Retained by Master for advertising sale	$
" " " " publishing notice of sale	$
" " " " commissions on sale	$
" " " " certificate of sale and duplicate	$
" " " " recording duplicate certificate	$
" " " " report of sale	$

The receipts for said payments are hereto attached as a part of this report and marked "Exhibits B, C, and D."

I have executed and delivered to
purchaser at said sale, the certificate of sale directed by said decree, and by law, to be executed, and have filed in the office of the Recorder of Deeds of said County the duplicate of said certificate.

In conclusion, I report that the proceeds of said sale were sufficient to pay the amount found to be due to said complainant

All of which is respectfully submitted.

Dated this.....day of.....19 .

.....

Master in Chancery of the ..... Court of Cook County, Illinois.

FORM OF RECEIPTS.

STATE OF ILLINOIS, }
County of Cook } ss.

In the .....Court.
In Chancery.
Gen. No.

Exhibit B.

.....19....

Received of....., Master in Chancery of said Court, ...Dollars, on account of amount due under decree herein, together with interest thereon.

.....

.....

Exhibit C.

.....19....

Received of....., Master in Chancery of said Court,.... .....Dollars, for solicitor's fees, due under decree herein.

.....

.....

Exhibit D.

.....19....

Received of....., Master in Chancery of said Court,.... .....Dollars, on account of complainant's taxed costs herein.

.....

.....

FORM OF ORDER CONFIRMING SALE.

STATE OF
County of } ss.

In the.....Court of.....County.
In Chancery.
..... Term, A. D. 19...

A.
-vs.- } Gen. No.
B.

ORDER CONFIRMING SALE AND DEFICIENCY DECREE.

And now again come said complainants, by said ....., their solicitor, and this cause comes on to be further heard upon the report of sale by ....., Master in Chancery, filed herein on the.....day of....., A. D. 19.., and thereupon, on motion of said complainant's solicitor, it is ordered and decreed that said report and sale, be, and hereby is fully approved and confirmed.

And it appearing to the Court from said report that the said Master has, as required by said decree, retained out of the proceeds of such sale his fees, disbursements and commissions on said sale, amounting to ..... Dollars ($.....), and paid to complainants their costs in this suit, amounting to..... .....Dollars ($.....), and their solicitor's fees, amounting to ..... Dollars ($.....), and filed their receipts therefor with his report, and that after deducting..... ..... Dollars ($.....), the amount so retained and paid out, there remained to be applied upon the amount due to said complainant ....., under said decree, the sum of

..... Dollars ($.....); and the said Master producing the receipt of ....., the said complainant, for said last-named sum, it is ordered that the same be, and it is, credited on said decree as paid to said complainant on said.... day of...., A. D. 19...

And it further appearing to the Court, from said report, that the proceeds of said sale were insufficient to pay the amount and adjudged to be due to said complainant, and that there is a balance due to said complainant ..... over and above such proceeds of sale, of the sum of ..... Dollars ($.....); now, therefore, it is ordered, adjudged and decreed by the Court that the said Complainant..... have and recover of and from the said defendants,..... ..... and upon whom personal service was had in this cause, and who are personally liable for the payment of said debt, the said last-mentioned sum of .....Dollars ($.....), and that the complainant.....have execution therefor, as upon a judgment at common law.

FORM OF MASTER'S CERTIFICATE OF SALE.

STATE OF....., } ss.
County of ..... }

.....COURT OF.....COUNTY.
IN CHANCERY.

A. B. }
vs. } Gen. No.
C. D. }

I, ..., Master in Chancery of the.....Court of..... County, ..., Do Hereby Certify, that pursuant to a decree entered on the .....day of .....A. D. 190 , by the said Court in the above entitled cause, I duly advertised, according to law, the premises hereinafter described, to be sold at public vendue, to the highest and best bidder for cash, at the hour of 11 o'clock in the forenoon, on the.....day of .....A. D., 190 , at the Judicial Sales Rooms of the Chicago Real Estate Board, No. 57 Dearborn Street, in the City of Chicago, in said Cook County. That at the time and place so as aforesaid appointed for said sale, I attended to make the same, and offered and exposed said premises for sale at public vendue, to the highest and best bidder for cash: Whereupon..... offered and bid therefor the sum of..... .....; and that being the highest and best bid offered therefor I accordingly struck off and sold to said bidder, for said sum of money, the said premises, which are situated in the..... .....County of Cook and State of Illinois, and are described as follows, to-wit: ....

And I do further certify that the said.....legal representatives or assigns, will be entitled to a deed of said premises on the .....day of.....A. D. 19 , unless the same shall be redeemed according to law.

Witness my hand and seal, this.....day of ..... A. D. 190 .

.....[SEAL.]

Master in Chancery of the.....Court of Cook County, Illinois.

MASTER'S CERTIFICATE OF REDEMPTION.

Whereas, The following described premises, situated in the County of Cook and State of Illinois, were on the..... .....day of .....A. D. 190 , exposed for sale at public vendue by the undersigned, one of the Masters in Chancery of the.....Court of Cook County, in pursuance of a decree made and entered by the.....Court of Cook County, on the.....day of.....A. D. 190 , in a certain cause then pending therein on the Chancery side thereof, in which..... defendant.....

And, Whereas, At said time..... being the highest and best bidder....therefor, became the purchaser...., for the sum of..... of said premises, to-wit: ..... and received from the undersigned a certificate of such sale, stating that the said purchaser would be entitled to a deed of said premises on the.....day of .....A. D. 19 , unless sooner redeemed.

And, Whereas, Twelve months have not elapsed since said sale,

And, Whereas, ... being interested in said premises has this day paid to the undersigned, as Master in Chancery, the sum of..... being the amount of said sale with interest thereon, and the further sum of .....for taxes and assessments paid by the holder of said certificate of sale on said premises, with interest thereon as and for the redemption of said premises from said sale.

Now, Therefore, The undersigned hereby certifies that said premises have been this day redeemed from said sale by..... in accordance with the provisions of the statute in such case made and provided.

Given under my hand and seal this .....day of .....A. D. 190 .

[SEAL.]

.....

Master in Chancery of the.....Court of Cook County.

MASTER'S DEED.

This Indenture, Made this .....day of ..... A. D. 190 , Between .....Master in Chancery of the ..... Court of .....County, in the State of Illinois, party of the first part, and .....
.....
of.....County of.....and State of.....
.....
party of the second part, witnesseth:

Whereas, In pursuance of a decree entered on the.....day of.....A. D. 19...by the.....Court of said..... County, in a certain case then pending therein, on the Chancery side thereof, wherein.....
.....
Complainant....and .....
.....
Defendant....the said Master in Chancery duly advertised, according to law, the premises hereinafter described, for sale at public auction to the highest .....bidder,
.....at the hour of .....o'clock, in the....
.....noon, on the .....day of .....A. D. 190 , at in ..... in said .....County.

And, Whereas, at the time and place so as aforesaid appointed for said sale, the said Master in Chancery attended to make the same, and offered and exposed said premises for sale at public auction, to the highest.....bidder,.....and thereupon.....
.....
offered and bid therefor the sum of .....
Dollars .....($.....).....; and that being the highest .....bid offered, said Master in Chancery accordingly struck off and sold to said.....
.....
for said sum of money, the said premises, and did thereupon sign, seal and deliver to said.....
.....
.....the usual Master's certificate therefor:
.....

And, Whereas, said premises have not been redeemed from said sale:

Now, THEREFORE, in consideration of the premises the said party of the first part doth hereby convey unto the said party of the second part.....heirs and assigns, the said premises, which are situated in.....County of .....and State of Illinois, and described as follows, to-wit:
.....

To Have and to Hold the same, with all the appurtenances thereunto belonging, unto the said party of the second part,..... heirs and assigns, forever.

Witness the hand and seal of the said party of the first part, the day and year first above written.

.....[SEAL.]
Master in Chancery of the.....Court of .....County.

STATE OF....., }
County of..... } ss.

I, a Notary Public in and for the said.....in the State aforesaid, DO HEREBY CERTIFY, that .....Master in Chancery of the.....court of said.....County, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act, as such Master in Chancery, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal, this.....day of .....A. D. 190 .

.....
Notary Public.

MASTER'S REPORT IN PARTITION SUIT.

STATE OF ILLINOIS, }
County of Cook. } ss.

IN THE SUPERIOR COURT.
IN CHANCERY.

A. B. }
vs. } Gen. No.
C. D. }

To the Honorable Judges of said Court, in Chancery sitting:

Pursuant to an order of reference heretofore entered herein, said Master reports as follows:

That, upon due notice to all the parties hereto, and in due form of law, parties were present, witnesses were duly sworn and testified, evidence was heard and received, and proceedings were had, as more fully appears from the transcript of proceedings and evidence annexed as a part of this report; which said transcript, together with the exhibits therein mentioned, contains all the evidence submitted before the Master in said cause; and from the competent evidence so submitted, and from the confessions under the pleadings in said cause, said Master finds the following matters of fact to be true:

That—

That— etc. etc.

(If the partition bill prays only for general relief master should make following recommendations as a guide for the court's next order).

Said Master therefore recommends that the Court appoint three commissioners, not connected with any of the parties herein, either

by consanguinity or affinity, and entirely disinterested, to make partition of said premises above described; that such commissioners each take and subscribe an oath or affirmation fairly and impartially to make partition of said premises, according to the rights and interests of the parties herein, as found above by said Master and as may be declared by the judgment of the Court, if the same can be done consistently with the interests of the parties; or, if the same cannot be so divided without manifest prejudice to the parties in interest, that such commissioners will fairly and impartially appraise the value of each piece of the premises aforesaid, and a true report make to said Court.

Said Master further recommends that such commissioners shall go upon said premises, and if the same are susceptible of division they shall make partition thereof, allotting the several shares to the respective parties entitled thereto as aforesaid, quality and quantity relatively considered, according to their respective rights and interests, as may be adjudged by said Court, designating the respective shares by metes and bounds, or other proper description, and that such commissioners may be permitted to employ a surveyor, with necessary assistants, to aid therein; and if the premises aforesaid are not susceptible of division without manifest prejudice to said parties in interest, they shall value each piece separately.

Said Master further recommends that such commissioners make report in writing, signed by at least two of them, showing what they have done, and, if they shall have made a division, describing the premises divided and the shares of each party by metes and bounds, or other proper description; or, if they find that said premises cannot be divided, they shall so report, and shall report their valuation of each piece separately.

Said Master further recommends that if the whole or any of the premises aforesaid sought to be partitioned cannot be divided without manifest prejudice to the said owners thereof, and the commissioners appointed to divide the same shall so report,. the Court shall order the premises so not being susceptible of division to be sold at public vendue, upon such terms and notice of sale as the Court shall direct, for not less than two-thirds of the total amount of the valuation of such premises so not susceptible of division.

All of which recommendations are in accordance with the provisions of the statute in such case made and provided.

All of which is respectfully submitted this.....day of.....,
.....

Master in Chancery of the.....Court of Cook County, Illinois.

MASTER'S REPORT OF PARTITION SALE.

STATE OF ILLINOIS, }
County of Cook. } ss.

IN THE SUPERIOR COURT.
IN CHANCERY.

A ET AL.
vs. } Gen. No.....
B ET AL.

REPORT OF PARTITION SALE BY ———————— MASTER IN CHANCERY.

To the Honorable Judges of said court, in Chancery sitting:

Pursuant to a decree made and entered by said Court in the above entitled cause on the 9th day of July, A. D. 1900, I,..... ....., Master in Chancery of said Superior Court, respectfully report that, in accordance with said decree, I duly advertised the premises in said decree and hereinafter described to be sold at public auction to the highest and best bidder for cash, and upon the terms and conditions set forth in said decree, at the Judicial Salesrooms of the Chicago Real Estate Board, No. 57 Dearborn Street, in the City of Chicago, County of Cook and State of Illinois, at the hour of eleven o'clock in the forenoon, on....., the....day of .....A. D. 19..., by causing a notice containing the title of said cause, the names of the parties thereto, the name of the Court in which said cause was pending, a description of the premises to be sold, and a statement of the aforesaid time, place, terms and conditions of sale, to be published for three successive weeks prior to said sale in the "....," a secular newspaper of general circulation in said County, published in said County every day except Sunday, the date of the first publication thereof being the.....day of.....A. D. 19..; the date of the second publication thereof, being the.....day of.....A. D. 19..; and the date of the third publication thereof being the.....day of ....., A. D. 19..; a certificate of which publication is hereto attached as a part of this report and is marked "Exhibit A."

At the time and place designated as aforesaid for said sale, I attended to make the same, and offered said premises for sale at public auction to the highest and best bidders for cash therefor, and upon the terms and conditions set forth in said decree. And I first offered each of said lots for sale separately and singly, making note of each amount offered for each single lot; and the sum total of the several bids upon said last-named offer by said Master was not sufficient to realize and fulfill the amount and terms set forth in said decree. I then offered the lots of said premises for sale singly and in groups to suit bidders; whereupon,..... .....offered and bid the sum of.....($.....) for Lot.....in block.....of said premises;..... .....offered and bid the sum of.....Dollars ($.....) for Lot.....in block.....of said premises; etc.

I next offered said premises for sale in any groups or combina-

tions of lots less than the whole of said premises, and there were no bids upon said last-named offer, except the bids as set forth as aforesaid. I next offered said premises for sale entire, and there were no bids upon said last-named offer. And the bids above specified being the highest and best bids offered for said premises, I struck off and sold to said....., for said sum of..... Hundred..... ($.....), Lot.....in Block.....in.....
.....
.....
.....
.....

And said Master further reports that said purchasers have paid said Master the amounts of their respective bids, conditional however, upon the confirmation by this Honorable Court of said Master's report of sale herein, and upon receiving from said Master their respective and proper deeds of conveyance of the premises respectively so sold to them as aforesaid; which said deeds of conveyance shall be in accordance with the terms and conditions set forth in said decree.

All of which is respectfully submitted, this.....day of....., A. D. .....

_____,

Master in Chancery of the.....Court of Cook County, Illinois.

ORDER CONFIRMING MASTER'S REPORT OF PARTITION SALE AND DIRECTING DISTRIBUTION.

STATE OF ILLINOIS, } ss.
County of Cook. }

IN THE.....COURT.
IN CHANCERY.

A. } Gen. No.
vs. } Term No.
B. }

The Report of————————, Master in Chancery, appointed by a former decree of the Court herein to make sale and to carry into effect said former decree and make report of his proceedings, having been filed in this Court on the.....day of.....A. D. 19..., and no objections having been filed thereto up to this date, and the Court, having examined said report, doth find that the said Master has in every respect proceeded in due form of law and in accordance with the terms of said decree, and that said sale was fairly made; and the Court, being fully advised in the premises, doth *order, adjudge and decree* That the proceedings, sale and report of said Master be and the same are hereby approved and confirmed; and it is further ordered that the said Master execute and deliver to the said ———————— purchaser at said sale, a proper deed of conveyance of the premises so sold; and that out of the proceeds of said sale said Master retain his commissions and fees as follows:

Report upon the issues..... $
Preparing notice of sale..... .75
Publishing notice of sale.....
Salesroom fee, imposed by decree..... .75
Commissions on sale.....
Report of sale..... 2.
Report of distribution..... 2.
Deed ..... 2.

Total

and said Master shall distribute the residue of said moneys between said parties as follows:
To complainant's solicitor the sum of..... $
To the three Commissioners heretofore appointed herein each the sum of $10.00..... 30.
To complainant, ———— for sums advanced for taxed costs .....
To ———————— on account of her dower interest in said premises.....
To ————————, on account of her 2/80 interest in and to the premises sold.....
To said————————, on account of her 39/80 interest in and to the premises sold.....
To said ————————, on account of her 39/80 interest in and to the premises sold.....

Said master is directed to take and file with his report the receipts for said payments.
Dated this ——— day of ——— 19—

Judge.

Master's Report of Distribution in Partition Suit.

————Court.

State of
County of } ss.

In Chancery.

A.
vs. } Gen. No.
B.

Bill for Partition.

Report of Distribution,.....Master in Chancery.

To The Honorable Judges of Said Court, in Chancery Sitting:

Pursuant to a further order entered in the above entitled cause on the.....day of....., 19 , whereby the Master's report of sale filed in this court on the.....day of....., 19 , was approved and confirmed, and by which order said Master was directed to execute and deliver to....., the purchaser at

said sale, a proper deed of conveyance of said premises, and by which order, also, said Master was ordered to make distribution of the proceeds of said sale and take receipts therefor, said Master reports as follows:

That the amount paid by said.....for premises was .....Dollars ($), which said sum said Master has distributed as follows:

Retained by Master as commissions and fees:

Report upon the issues.....$
Preparing notice of sale.....
Publishing notice of sale.....
Salesroom fee imposed by decree.....
Commissions on sale.....
Report of sale.....
Report of distribution.....
Deed .....
——— $

Paid Commissioners' fees.....
Paid complainant,.....for sums advanced for taxed costs
Paid and delivered to.....on account of her dower in said premises.....$
Paid and delivered to.....on account of her 2/80 interest in the premises sold.....$
Paid to.....on account of her 39/80 interest in the premises sold.....$
Paid to.....on account of her 39/80 interest in the premises sold.....$

Total .....$

The receipts for said payments are hereto attached as a part of this report, and are marked, respectively, Exhibit A, B, C, D, E, F and G.

Said master reports that he has executed and delivered to..... purchaser at said sale a proper deed of conveyance of said premises.

All of which is respectfully submitted this.....day of....., 19...

.....
Master in Chancery of the.....Court.

CHANCERY RULES

OF THE

CIRCUIT AND SUPERIOR COURTS

OF

COOK COUNTY, ILLINOIS.

[Note: The rules of the two courts are the same except as indicated herein].

APPEARANCE OF PARTIES.

1. When any defendant who shall be summoned, served with a copy of the bill or petition, or notified of the commencement of the suit, as required by law, shall enter and file an appearance in writing, before default taken, the party entering such appearance shall thereby, without any order, have twenty days from the first day of the appearance term within which to except, plead, answer or demur. By "appearance term" is meant the term at which the party might be defaulted for failure to appear.

When any defendant who has not been summoned, etc., as required by law, shall enter an appearance, he shall give the complainant's solicitor immediate notice of the fact, and shall except, plead, answer or demur within twenty days after entering such appearance.

DEFAULTS.

2. On and after the third day of each term defaults may be entered as to such defendants as have been served in due time, and have filed no appearance in writing.

MOTIONS OF COURSE—CIRCUIT COURT.

3. Motions of Course will be heard at the opening of court on the morning of each day (and the time occupied therein shall be known as "motion hour"), and notice thereof (except in default cases) of at least one day shall be given to the solicitor of record of the

opposite party, if there be such solicitor, and be supported by affidavit whenever based on matters of fact not appearing of record or by files in the case.

MOTIONS OF COURSE—SUPERIOR COURT.

4. Motions of Course will be heard at the opening of court at ten o'clock each day (and the time occupied therein shall be known as "motion hour"), and notice thereof (except in default cases) of at least one day shall be given to the solicitor of record of the opposite party, if there be such solicitor, and be supported by affidavit whenever based on matters of fact not appearing of record or by files in the case; but all notices served on Saturday shall be served before twelve o'clock noon of that day.

WHAT MAY BE CONSIDERED AS MOTIONS OF COURSE.

Motions for default; default decrees, for appointment of commissioners in partition, for confirmation of reports of commissioners and of masters, where no exceptions are filed; motions for rules to plead, answer or demur concerning amendments of pleadings or for leave to file any pleading or paper; to set aside defaults, for new bonds; that sureties justify; concerning *ne exeats*; for *ex parte* injunction orders; touching the custody of children; motions for reference to a master and for contempts of court, may, among others, be considered motions of Course.

HOW MADE.

A note of such motions shall be made by the solicitor of the moving party in a "motion book," to be provided by the clerk, or by a memorandum thereof delivered to the minute clerk (whose duty it shall be to enter the same in the motion book in the order of the receipt thereof) before the opening of court. The note, or memorandum, shall designate the term number and title of the cause, with a brief statement of the nature of the motion, the name of the moving solicitor, and, except in default cases or where no appearance has

been entered, the name of the solicitor of the opposite party.

Such motions will be called in their order in the motion book, and solicitors will not rise to address the court upon a motion until it has been called.

MOTIONS.

If no one appears for or against a motion when called, it will be stricken from the contested motion calendar or the motion book upon which it may be pending.

Motions, whether "contested" or "of course," if not supported by the moving solicitor when called, will be overruled, as of course, on the suggestion of opposing solicitor, who, in response to notice thereof, is in attendance; and no renewal thereof will be permitted except for cause shown, upon service of notice of motion therefor, with copy of affidavit, etc., upon the opposing solicitor, and upon reasonable terms in the discretion of the court, or upon consent thereto in writing of the opposing solicitor.

In all cases where a motion is made before default day, and there is no appearance of defendant by solicitor, the defendant shall be personally served with at least one day's notice thereof, and with copies, as hereinbefore directed, if practicable, and not otherwise determined by the court, because of the emergency thereof. All motions, except in default cases, shall be reduced to writing and filed in the cause before action of the court is moved thereon.

CONTESTED MOTIONS.

Contested motions shall be deemed to include all motions pertaining to the settling of pleadings, for alimony and solicitors' fees, for injunctions upon notice, to dissolve injunctions, for the appointment and removal of receivers, the hearing of exceptions to masters' and receivers' reports, and all other opposed motions the hearing of which will operate to unduly delay the court in its other duties.

A calendar of such motions will be made up on

Friday of each week for hearing on the following Monday, in the order of filing notices thereof with the minute clerk, and will be posted in the court room. The court may in its discretion continue the call of said calendar from day to day, or on a particular day to be specified, without notice except as may be announced during the call thereof, and may, whenever in its opinion the exigency of the case requires it, hear particular motions at any time.

Motions passed under the rule relating to the engagement or other disability of a solicitor shall be placed at the head of the next succeeding calendar in the relative order they occupied on the pending calendar.

Motions continued by order or consent will be placed in their relative order at the foot of the next calendar, unless otherwise ordered.

To entitle a motion to be placed and heard on the contested motion calendar, notice thereof, together with a copy of all affidavits and other pertinent and competent papers relied upon and to be read in support thereof (except the records, files, pleadings, depositions, reports of masters and receivers, and other proceedings in the cause, or in other causes), must be served on the solicitor of the opposing party before four o'clock in the afternoon of the preceding Thursday, and a copy of all counter-affidavits, etc. (with the like exceptions), must be served on the solicitor of the moving party before twelve o'clock noon of Saturday succeeding. Said notice, with proof or acceptance of service thereof, must be delivered to the minute clerk before two o'clock P. M. of Friday.

To entitle records or other proceedings in the same cause, or in the other causes than the one in which the motion is made, to be read either in support of or in opposition to a motion of any kind, brief designation thereof must be made by notice to the solicitor of the opposite party within the times mentioned for the service of affidavits.

Affidavits and matters of record, strictly in rebuttal, may be read without notice, or the service of a copy thereof.

Motions, in cases where the emergency thereof will not admit of the delay incident to the contested motion calendar, may be taken up and heard at any time, upon such notice as the court may in its discretion direct, or without notice if the court shall so determine.

Except by permission of the court, but one solicitor on each side shall be heard on any motion, demurrer, or any interlocutory matter.

TRIAL CALENDAR.

5. When any chancery cause is at issue, upon notice and motion of either party, the cause, at any time within ten days of the commencement of the term for which a trial calendar may be ordered made, may be ordered placed on the trial calendar; and any cause before issues joined may be ordered placed upon the trial calendar by consent of the parties, or by order of the court, but issues must be joined therein before the cause is reached for final hearing.

The cases on such calendar shall be called and tried on Tuesday, Wednesday, Thursday and Friday of each week, and also on Mondays and Saturdays when so directed by the court. No more than five cases shall be fixed for trial upon the same day; but if the court is behind in the call of the calendar, not exceeding six cases may be called for trial on any one day. All cases remaining undisposed of upon any calendar shall, without further order, be placed at the head of the next (new) calendar. (See rule 7.)

SICKNESS, ETC., OF SOLICITOR.

6. When the principal solicitor of a party is sick, or actually engaged in the trial of a cause in some other court of record in this county (or in the Supreme Court) at the time the cause is called for trial, and the adverse party is ready, the court, if satisfied by affidavit or otherwise that the party seeking the delay would have been ready for trial but for the sickness or engagement of his solicitor, may order said cause passed or continued upon such terms as the court may direct; provided, however, the court may on passing

such cause set the same for hearing peremptorily at some future day.

PASSED CASES.

7. No case will be passed a second time for either of the causes mentioned in the preceding rule; any case so passed shall be in order to be called up for trial at any time after the cause for which the same was passed shall cease, but notice shall be given to the opposite party or his solicitor; which notice shall be at least one day's notice, unless the case is to be called up for trial upon the same day that it is passed.

If no such notice shall be given during the term or terms the trial calendar shall be called, the case shall be placed by the clerk, without further order, at the foot of the next trial calendar.

DIVORCES AND DEFAULT CASES.

8. All divorces and other default cases, in which notice shall be given the clerk to place the same upon the default calendar, will be heard upon Saturday of each week, unless otherwise determined by the judge before whom such cause is pending. No references shall be allowed in default divorce cases except as to questions of alimony or property, and all testimony must be taken by deposition or in open court. When taken in open court, it must be taken in shorthand, written out and presented to the court and filed before a decree will be entered. No decree of divorce will be granted upon the unsupported testimony of the complainant.

When an answer is filed, the case may be placed on the trial calendar upon notice and motion thereof, and heard in its order.

Within ten days after the hearing of any default or uncontested divorce suit, the complainant shall hand to the minute clerk a draft of the decree and certificate of evidence; in default whereof, unless for good cause shown that the time be extended, the bill shall be dismissed.

WITHDRAWAL OF SOLICITORS.

9. No solicitor will be permitted to withdraw his appearance for any party unless the court shall be satisfied, by affidavit or otherwise, that such party has had reasonable notice of the solicitor's intention to withdraw his appearance in the cause.

CIRCUIT COURT—ABSTRACT OF PLEADINGS AND EVIDENCE.

10. The court may at any time require parties to make and file an abstract of pleadings and of the evidence, when the same shall have been taken by deposition or before a master.

SUPERIOR COURT—ABSTRACT OF PLEADINGS AND EVIDENCE.

10. In all cases heard in this court, except where otherwise determined by the court, the parties shall prepare an abstract or abridgement of their respective pleadings, and of the evidence, when the same shall have been taken by deposition or before a master in chancery, and such abstract of the pleadings and evidence shall be read on the hearing in lieu of the original pleadings and depositions.

DECREES, ETC., AS TO SALE OF REAL ESTATE.

10½. All decrees and orders of this court directing the public sale of any real estate, or an interest therein, shall provide that such sale shall be made at the rooms of the Chicago Real Estate Board in the City of Chicago, unless the court, for cause shown, shall otherwise order.

CHANGING FINAL DECREE AS TO ALIMONY OR CUSTODY OF CHILDREN.

11. All applications for changing a final order or decree concerning alimony or the custody of children shall be by petition in writing, verified by affidavit. Upon the filing thereof, a rule on the respondent to plead, answer or demur in ten days after service of the copy thereof on such respondent may be obtained. Issues joined therein may be heard at such time as the court may order. The court may, in its discretion, upon motion, refer the same to the master, as in other cases.

BONDS.

12. Upon the motion of any party in interest, the bond of any receiver, injunction or other bond may be ordered spread of record in the cause in which it is filed.

COMPLETE RECORD, ETC.

13. A complete record may be made of all pleadings, files, etc., in any cause upon the motion of any party in interest, upon such terms as to the costs thereof as the court may order.

Any pleading or file may be ordered spread of record in any cause before final decree, upon such terms and in such manner as the court may order.

RECEIVERS.

14. Notice of the filing of reports by receivers, and of all orders asked for by any receiver, and of all orders to be made on such receiver, shall be given to each and all the solicitors, or firm of solicitors, of record in the cause.

PLEADINGS AND COPIES THEREOF.

15. Upon the filing of every bill or petition (or within twenty-four hours thereafter), a copy of the same and of all exhibits accompanying the same shall be filed with the clerk of the court, marked "copy." And upon the filing of any other pleading, a copy thereof and of the exhibits accompanying the same shall also be filed with the clerk.

Any such copy may be taken by the solicitor of any party to the cause upon his receipting therefor to the clerk, as hereinafter provided; but in no case shall the original of any such bill, petition, pleading or exhibit or file to be taken from the custody of the clerk, except upon special order of the court, entered of record in the cause.

CHANCERY REGISTER.

That the clerk procure and keep a suitable book, to be known as "The Clerk's Chancery Register," in which shall be noted:

First. The number and title of all chancery causes, petitions, or proceedings commenced upon the Chancery side of this court.

Second. The names of the respective solicitors and counsel therein.

Third. The date of filing the bill, petition, demurrer, answer or other pleadings therein, and of all affidavits, exhibits, or other papers therein, describing the same as briefly as may be necessary for identification.

Fourth. The date when any such bill, petition, demurrer, answer, pleading, etc., or filed copy thereof, shall be taken from the files, to whom delivered, and when returned. But no such delivery shall be made to any person other than a solicitor or counsel in the cause or his or their clerk, known to be such; nor shall the entire files, or any injunction, receiver's or other bonds, writ or other process be delivered to any other person than a bailiff or deputy clerk of this court.

It is also ordered that no such bill, partition, demurrer, answer, pleading, etc., or filed copy thereof, shall be permitted to be taken from the files except upon leaving with the Clerk a receipt therefor upon the receipt book provided for that purpose, nor shall the same be retained for a longer time than three days (the date when taken shall be counted as one day); and if the same is not returned within such three days, it shall be the duty of the clerk in charge of such register to forthwith make a report to the court, to the end that a rule may be made to return the same to the files instanter.

For any violation of this rule, or for any cause, the court may direct the clerk to refuse to allow any specified solicitor or counsel to take any pleading, etc., or filed copy thereof, from any of the files of the court.

COSTS.

16. When there are several defendants, if a single appearance is filed for all, but one appearance fee of three dollars ($3.00) is required to be paid; but if several appearances are filed for different parties,

either by different solicitors or by the same solicitor at different times, an appearance fee must be paid for each appearance.

When the appearance fee has been paid, no costs are required upon filing a cross-bill.

PAUPER CASES—SUPERIOR COURT.

New rule adopted June 27, 1905. (See Common Law Rule 28.)

PAUPER CASES—CIRCUIT COURT.

Same as Common Law Rule 28.

RULES GOVERNING MASTERS IN CHANCERY.

1. Whenever a reference shall be made to a Master in chancery of this court, to take testimony and report the same, or to take testimony and report the same with his conclusions thereon, to the court, the master to whom such reference is made shall, as soon as practicable, fix a day to proceed with the taking of testimony or evidence on such reference; and on the day so fixed he shall proceed with the taking of such testimony or evidence, and may, in his discretion, fix a day within which the complainant shall close his proofs, which time he may, in his discretion, for good cause shown, extend for such reasonable time as justice may require; and, as soon as the complainant has closed his proofs, shall fix a time within which the defendant shall close his proofs, and the complainant his proofs in rebuttal; and in his discretion, for good cause, may extend the time for such reasonable time as justice may require. In case the parties shall not close their proofs within the time limited by the master, he shall proceed to make up his report upon the testimony and evidence that may have been submitted to him, without waiting for further evidence or testimony from the party so failing to close his proofs within the time limited.

2. Whenever such reference is made to a master in chancery of this court to take testimony and report the same, or to take testimony and report the same

with his conclusion thereon, to the court, the master shall have full power and discretion to pass upon all questions of competency of witnesses, and the propriety and relevancy of all questions or interrogatories put by counsel; and the master shall note his ruling upon each objection in the minutes of the proceedings before him. When the master has ruled that a party or witness shall answer a given interrogatory, it shall be the duty of such witness or party to answer in the same manner as if such witness or party had been so directed by the court; and in case the master shall hold that any question is irrelevant or incompetent, the same shall not be answered. If either party shall except to the ruling of the master upon the admissibility of testimony or evidence, they shall, after the testimony and evidence before the Master is closed, and before he makes his report thereon, bring such objections and exceptions to the master's ruling upon the testimony before the court; and if the court shall sustain the rulings of the master, the master shall immediately proceed to make his report upon the testimony and evidence submitted to him; and if such objections and exceptions to the rulings of the master shall be sustained, the master shall proceed to take such further testimony as the court may direct, and shall disregard, in making up his report, such testimony as the court may rule to be incompetent or irrelevant.

3. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor, and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce* or upon oral or written interrogatories, in the master's office, as the master may direct.

4. The master shall be at liberty to examine any creditor or other person coming in to make a claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his pres-

ence, if either party requires it, in order that the same may be used by the court, if necessary.

5. All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.

6. Every bill or petition upon which an *ex parte* preliminary injunction—order for the appointment of a receiver—or for a writ of *ne exeat republica* is desired, shall be filed with the clerk of the court before the same is presented to a judge for an order, or to a master for a recommendation, as to such injunction, receiver or writ of *ne exeat.* For such purpose the clerk may deliver such bill or petition to the solicitor or person filing such bill, upon his receipting therefor to such clerk, but the same must be returned to the custody of such clerk immediately after such judge or master shall have passed upon such application.

No master shall examine any such bill or petition presented to him until the same shall have been filed as aforesaid, and the master's fee paid to such master.

The judge or master shall indorse upon or at the foot of every such bill or petition so presented and examined by him his conclusion, or recommendation, as to whether the prayer of such bill or petition as to such injunction, receiver, or *ne exeat* shall be granted.

No master shall examine or make any recommendation upon any such bill or petition which shall contain the indorsement of any judge or master as aforesaid, except upon a special order of the court to that effect.

7. The attendance of solicitors (Superior Court) shall not be compulsory before masters in chancery in any matter on Saturday after 1 o'clock P. M.

8. Attendance before the master in chancery during the vacation of the courts shall not be compulsory, except upon special order made in the particular case; nor shall attendance upon any Saturday be compulsory except upon like special order. (Circuit Court.)

RULES—WHEN TO GO INTO EFFECT.

The foregoing rules shall go into effect and be in force from and after the 15th day of October, 1897, and on and from that date shall supersede all prior rules adopted by this court.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY.

OF

THE UNITED STATES

RULE I.

Court always open.—The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

RULE II.

Rule day.—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders and other proceedings which are grantable of course and applied for, or had, by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

RULE III.

Orders at chambers.—Any judge of the Circuit Court, as well in vacation as in term, may at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party or his

solicitor to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

RULE IV.

Order book—Entry of motions.—All motions, rules, orders and other proceedings, made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

RULE V.

Motions grantable by clerk.—All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso;* for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applica-

tions grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

RULE VI.

Motions not of course.—All motions for rules or orders or other proceedings which are not grantable of course or without notice shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte,* and granted, as if not objected to, or refused, in his discretion.

RULE VII.

Mesne process.—The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

RULE VIII.

Final process.—Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the Circuit Court in suits at common law in actions of *assumpsit.* If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done; of

which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus,* to compel obedience to the decree.

RULE IX.

Writ of assistance.—When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

RULE X.

Persons not parties.—Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

RULE XI.

Issuance of subpœna.—No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

RULE XII.

Return of subpœna.—Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as

of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties; which subpœna shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day on which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there is more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

RULE XIII.

Manner of service of subpœna.—The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

RULE XIV.

Alias subpœna.—Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against each defendant, if he shall require it, until due service is made.

RULE XV.

By whom served.—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

RULE XVI.

Docketing cause.—Upon the return of the subpœna

as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

RULE XVII.

Appearance, when and how entered.—The appearance day of the defendant shall be the rule day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

RULE XVIII.

Default and decree pro confesso.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer or answer to the bill in the clerk's office on the rule day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order, as of course, in the order book that the bill be taken *pro confesso;* and thereupon the cause shall be proceeded in *ex parte,* and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

RULE XIX.

Decree pro confesso—Default set aside.—When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso;* and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

RULE XX.

Bill, form of.—Every bill, in the introductory part thereof, shall contain the names, places of abode and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of ——: A. B., of ——, and a citizen of the state of ——, brings this his bill against C. D., of ——, and a citizen of the state of ——, and E. F., of ——, and a citizen of the state of ——. And thereupon your orator complains and says that," etc.

RULE XXI.

Clauses omitted from bill.—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also, what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also, what is commonly called the jurisdiction clause of the

bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or starting part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno,* or any other special order, pending the suit, is required, it shall be specially asked for.

RULE XXII.

Parties beyond jurisdiction.—If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

RULE XXIII.

Prayer for process.—The prayer for process of subpœna in the bill shall contain the names of the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno,* or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

RULE XXIV.

Counsel must sign bill.—Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed.

RULE XXV.

Costs—Purposes of taxation.—In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

RULE XXVI.

Contents of bill—Exceptions.—Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts or other instruments, *in hæc verba,* or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

RULE XXVII.

Exceptions for scandal or impertinence.—No order shall be made by any judge for referring any bill, answer or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by

counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report on the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

RULE XXVIII.

Bills amended—Costs paid and copy furnished.—The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and, generally, in matters of form. But if he amend in a material point, as he may do of course, after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

RULE XXIX.

Amendment of bill.—After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct.

But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

RULE XXX.

Abandonment and proceeding thereon.—If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

RULE XXXI.

Certificate of counsel—Affidavit.—No demurrer or plea shall be allowed to be filed to any bill unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

RULE XXXII.

Defendant may demur, plead or answer.—The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part and answer to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied by an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

RULE XXXIII.

Setting down for argument.—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

RULE XXXIV.

Proceedings on overruling demurrer or plea.—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso,* and the matter thereof proceeded in and decreed accordingly.

RULE XXXV.

If sustained—Amendment of bill.—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

RULE XXXVI.

Extent of demurrer or plea.—No demurrer or plea shall be held bad and overruled upon argument only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

RULE XXXVII.

Answer as affecting demurrer or plea.—No demurrer or plea shall be held bad and overruled upon argument only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

RULE XXXVIII.

Failure to reply or to set down for argument.—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course unless a judge of the court shall allow him further time for the purpose.

RULE XXXIX.

Answer.—The rule that if a defendant submits to answer he shall answer fully to all the matters of the bill shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

RULE XL.

Interrogatories.—It shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so to obtain a discovery.

RULE XLI.

Interrogatories continued.—(1) The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

(2) If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may, nevertheless, be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of congress of July 2, 1864.

RULE XLII.

Note specifying interrogatories to be answered part of bill.—The note at the foot of the bill specifying the interrogatories which each defendant is required to answer shall be considered and treated as part of the bill; and the addition of any such note to the bill, or

any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

RULE XLIII.

Form when interrogatories are used.—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words: "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say—

"1. Whether, etc.

"2. Whether," etc.

RULE XLIV.

When interrogatories need not be answered.—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

RULE XLV.

Special replication not allowed.—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or a judge thereof, may in its discretion direct.

RULE XLVI.

Answer to amended bill.—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

RULE XLVII.

Omission of parties.—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in its discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

RULE XLVIII.

Parties, when numerous.—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court, in its discretion, may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

RULE XLIX.

Suits by trustees.—In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons

beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

RULE L.

Heir, when party, and when not.—In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

RULE LI.

Joint and several demands.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

RULE LII.

Defect of parties.—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of

the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

RULE LIII.

Objection of defect of parties.—If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court, if it shall think fit, shall be at liberty to make a decree saving the rights of the absent parties.

RULE LIV.

Nominal parties.—Where no account, payment, conveyance or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

RULE LV.

Injunctions.—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant does not enter his appearance, and plead, demur or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled, as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte,* if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall,

unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

RULE LVI.

Revivor of suit.—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time, and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

RULE LVII.

Supplemental bill.—Whenever a suit in equity shall become defective from any event happening after the filing of the bill, as, for example, by change of interest in the parties, or for any other reason, and a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

RULE LVIII.

Bill of revivor or supplement.—It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

RULE LIX.

Answer verified before whom.—Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a state or territory, or notary public.

RULE LX.

Amendment of answer.—After an answer is put in, it may be amended as of course in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

RULE LXI.

Exceptions for insufficiency.—After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

RULE LXII.

Costs of separate answers.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

RULE LXIII.

Setting down exceptions for argument.—Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

RULE LXIV.

If exceptions sustained, further answer.—If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise, the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the

court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

RULE LXV.

Costs on exceptions.—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

RULE LXVI.

Replication.—Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc,* the plaintiff submitting to speed the cause, and to such other terms as may be directed.

RULE LXVII.

Testimony—How taken.—(1) After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte.* In all cases the commissioner or com-

missioners shall be named by the court or by a judge thereof. Ordered, that the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

(2) Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally; and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court or before an examiner to be specially appointed by the court. The examiner, if he so requests, shall be furnished with a copy of the pleadings; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and such examinations shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skilful stenographer or by a skilful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken,

then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial or irrelevant depositions, or parts of them, as may be just.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evi-

dence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

RULE LXVIII.

Under acts of congress.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

RULE LXIX.

Time for testimony.—Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony

may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order books, or indorsed upon the deposition or testimony.

RULE LXX.

Infirm, single, or about to depart.—After any bill filed, and before the defendant has answered the same, upon affidavit made that any of plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct to take the examination of such witness or witnesses *de bene esse,* upon giving due notice to the adverse party of the time and place of taking his testimony.

RULE LXXI.

Last interrogatory.—The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

RULE LXXII.

Cross-bill—Answer to.—Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

RULE LXXIII.

Account of estate.—Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

RULE LXXIV.

Proceedings on reference.—Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference was made shall cause the same to be presented to the master for hearing on or before the next rule day succeeding the time when the reference is made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE LXXV.

Master, proceedings before.—Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte,* or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

RULE LXXVI.

Master's report.—In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before him shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition or answer was so brought in or used.

RULE LXXVII.

Duty and power of master.—The master shall regulate all the proceedings in every hearing before him upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath, *viva voce,* all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

RULE LXXVIII.

Attendance of witnesses.—Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpœna in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master or examiner, requiring the at-

tendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

RULE LXXIX.

Form of accounts.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce,* or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

RULE LXXX.

What used before master.—All affidavits, depositions and documents which have been previously made, read or used in the court upon any proceeding in any cause or matter may be used before the master.

RULE LXXXI.

Who may be examined.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce,* or in both modes, as the nature of the case may appear to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

RULE LXXXII.

Appointment—Fees.—The Circuit Courts may appoint standing masters in chancery in their respective districts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district concurring in the appointment); and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

RULE LXXXIII.

Return and entry of master's report.—The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto, and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court if the court is then in session, or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

RULE LXXXIV.

Costs on frivolous causes.—In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay

costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

RULE LXXXV.

Correction of decree.—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

RULE LXXXVI.

Decree, form of.—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:" [Here insert the decree or order.]

RULE LXXXVII.

Suits by or against incompetents.—Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami;* subject, however, to such orders as the court may direct for them.

RULE LXXXVIII.

Rehearing.—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record,

shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court in the discretion of the court.

RULE LXXXIX.

Rules by Circuit Court.—The Circuit Courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges and the district judge for the district concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

RULE XC.

Rules of practice.—In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

RULE XCI.

Affirmation.—Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

RULE XCII.

Decree in foreclosure cases.—In suits in equity for the foreclosure of mortgages in the Circuit Court of the United States, or in any court of the Territories

having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

RULE XCIII.

Injunction—On appeal.—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

RULE XCIV.

Bill by stockholder.—Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

WAUGH v. ROBBINS,

33 Ill. 182.

(1864.)

WALKER, C. J. In this case complainant exhibited [*183] in the court below this bill to foreclose a mortgage, executed by James A. Waugh and Sarah A. Waugh to him. It alleges that the mortgage was executed to secure the payment of money advanced by complainant for the purpose of improving the mortgaged premises. *That at the time [184*] the mortgage was executed the mortgagor had no title to the premises, but it was expected the deed would be made to Sarah A. Waugh alone; but on the contrary, the property was conveyed to Sarah A. Waugh and her four children, upon the terms that the children owned jointly one-half of the property, and Sarah A. the other half. That complainant paid the entire consideration for the premises, which was, that it should be improved by the erection of a house thereon, which was built with complainant's money, and the conveyance was made after the building was erected. That the grantees paid nothing. He claims that the property should be sold for the satisfaction of the mortgage.

The adult defendants answer, and insist by way of plea, that they only have a life estate in the premises, and had no other or greater interest. They afterwards filed a cross-bill in which they allege that they are very poor, and their children in need of the necessaries and comforts of life, and their interests in the lot ought to be sold for their support, to say nothing of their education; and that they have no personal

property; and pray a sale of their interest in the premises for their support. Complainant answered, admitting the allegations of the cross-bill. The guardian *ad litem* for the minor defendants answered, that he was uninformed of the truth of the allegations of the bill, and required strict proof. On the hearing, the court decreed a foreclosure and sale of the property, also that the conveyance to Sarah A. Waugh and her children was in fraud of complainant's rights, and that the minor defendants take nothing by the conveyance, as against complainant. That the money arising from the sale should be applied to the payment of the mortgage debt, and if any surplus, that it be paid to Sarah A. Waugh for her benefit and that of her children.

There is no evidence in this record to establish the finding of the court that this deed was in fraud of the rights of the mortgagee. Nor does the bill allege that it was in fraud of his rights. It does allege that when he advanced the money and took the mortgage, it was with the expectation that the property would be conveyed to the mortgagors; and that it [*185] was *done in the mode described, contrary to his expectations. He does not allege such was the agreement, or that it was so understood. It has been so frequently held by this court that the evidence upon which a decree is based must be in some manner preserved in the record, that it is unnecessary to refer to cases. This is especially true in reference to decrees against minors. Where minors are defendants to a bill, a decree can only be rendered against them on full proof. Nor can their natural or legal guardians by consent waive this requirement. This decree operates to deprive them of their property, and yet no evidence is found in the record, even if the allegations of the bill were sufficient, to authorize such a decree. For these reasons the decree of the court below is reversed and the cause remanded, with leave to amend the bill.

Decree reversed.

CAMPBELL v. POWERS,

139 Ill. 128.

(1891.)

SHOPE, J. The first point made by the counsel is that the demurrer was improperly sustained. Every bill must contain sufficient matters of fact *per se* to maintain the case, so that the same may be put in issue by the answer, and established by proofs. Harrison v. Nixon, 9 Pet. 502; Boone v. Chiles, 10 Pet. 177. Appellant, by his bill, asks that appellee be required to unconditionally convey to him a half interest in the leasehold alleged to have been purchased of Cooper. Every claim to equitable relief necessarily rests on an existing right, not only in respect of the matter demanded to be done, but also to immediately demand it of the defendant. If for any reason founded on the substance of the case, as stated in the bill, admitted it to be true, the complainant is not entitled to the relief sought, the defendant may properly demur. Story, Eq. Pl. § 526. A very brief analysis of the bill, keeping in view that the intendments are against the pleader, will show that the bill wholly fails to state a case entitling him to the relief prayed or to any other relief. By reference to the resume of the bill heretofore given it will be seen that only a single date is given to any of these transactions, that being March 1, 1889, when, it is alleged, the original contract between these parties was made. It is alleged they procured an option from Cooper to purchase his lease; but when it was procured, for how long a time the option continued, or when it expired, are left wholly to conjecture. It is alleged also that appellee purchased of Cooper in his own name; but as to when, whether during the life-time of the option or after its termination, when all rights thereunder had ceased, there is no information afforded by any allegation of the bill. Eleven months had elapsed, substantially, between the making of the alleged contract by the appellant with appellee and the filing of this bill, and,

for aught that is stated in the bill, all right under the option given by Cooper had ceased many months before the purchase by appellee. Again it would seem from the allegations of the bill that the original agreement between these parties contemplated a loan, secured by mortgage of the estate, to pay the purchase price of the leasehold estate, as well as to erect buildings thereon. The allegations of the bill show that the parties were negotiating "for a loan of money sufficient to erect a building" simply. How the large sum of money required to pay for the leasehold estate was to be raised, or how it was in fact raised, if at all, is not shown. Moreover, if it be conceded that the lease was to be paid for out of a loan raised on the leasehold property, and that it was the duty of the appellee, under the alleged trust, to make the same for the joint benefit of himself and appellant during the continuance of the option, there is not the slightest intimation that he did, or could, by the exercise of due diligence and skill, make such a loan, and thereby perform the alleged trust. Nothing was paid Cooper for the alleged option, nor was there an assumption by the parties of the liability of Cooper under the covenants of said lease. Appellant did nothing beyond employing an architect to prepare plans of a building, and neither by his bill nor otherwise offers to do anything. No tender is made in the bill or otherwise of any part of the purchase price of the leasehold estate, and there is no statement that he ever offered to contribute anything towards the purchase. If appellee was compelled to advance the entire cost of the purchase from Cooper before appellant would be equitably entitled to the relief prayed for, he must reimburse appellee a *pro rata* share of the money expended, even though the purchase was under the option; and this, being a condition to his right to equitable relief, must be offered in his bill. On the other hand, if it be assumed, as may be done consistently with the material allegations of the bill, that the "specified time" for which the option had been given had elapsed, and the joint enterprise been abandoned;

that appellee purchased the lease in good faith for himself—there is nothing alleged that would charge him with a trust in favor of appellant, or render him a trustee *ex maleficio* in respect of said estate. We are of the opinion that the demurrer was properly sustained.

It is next insisted that the court erred in overuling appellant's motion for leave to amend. It may be conceded that the showing was sufficient to excuse appellant for not having made his amendment under the leave given, and for not applying for additional leave at an earlier date. The application was then addressed to the sound discretion of the chancellor, to be exercised for the furtherance of justice. It appears, however, from the certificate of the judge that he denied the leave upon the ground that the order sustaining the demurrer and granting leave to amend was a final order, which the court at a subsequent term could not modify, and held that, complainant having failed to amend his bill according to said order, the court was without jurisdiction or power to then grant said leave. We concur with the Appellate Court that the chancellor was in error in so holding. The case was still pending in the Superior Court. Knapp v. Marshall, 26 Ill. 63. The order entered was in interlocutory, and the court had power and jurisdiction to make such further order in the cause as justice might require. Hayes v. Caldwell, 5 Gilman, 33; Gage v. Rohrbach. 56 Ill. 262; March v. Mayers, 85 Ill. 177; Lodge v. Klein, 115 Ill. 177, 3 N. E. Rep. 272.

It is insisted with great earnestness that, the Superior Court having placed its refusal to grant leave to amend upon erroneous grounds, and not having considered whether its discretion should be exercised to permit the amendment, the case must be reversed and remanded, to the end that the chancellor may exercise such discretion in passing upon the granting of leave to amend, and that, therefore, the Appellate Court erred in exercising a discretion committed to the chancellor alone, and in refusing to reverse and remand. This is manifestly erroneous. The entire

showing made to the chancellor is in the record, and if for any reason the discretion should not have been exercised, or the leave should have been denied, the action of the Superior Court in refusing the leave was properly affirmed. It is of the judgment of the court appellant is permitted to complain, and not of the grounds or reasons upon which the court founded its decision. In chancery, amendments are allowed generally with great liberality in furtherance of justice, and at any stage of the proceeding. However, in respect of sworn bills greater caution is exercised. 1 Daniell, Ch. Pr. 402, note 1. It was said by this court in Gregg v. Brower, 67 Ill. 529, that when the object of the amendment was to let in new facts there is greater reluctance to allow the amendment when it depends upon extrinsic proof than when it rests upon documentary evidence, "and if the fact was known to the complainant at the time of filing his bill, such amendment will not be allowed unless some excuse is given for the omission." Citing Calloway v. Dobson, 1 Brock 119; Whitemarsh v. Campbell, 2 Paige, 67; Prescott v. Hubbell, 1 Hill. Eq. 217; Coal Co. v. Dyett, 2 Edw. Ch. 115. In the subsequent case of Jones v. Kennicott, 83 Ill. 484, which was a bill for *ne exeat,* and required to be verified by the oath of the party, this court, in passing upon the right of complainant to amend his bill after demurrer sustained, said: "The party asking leave to amend should present and submit in writing the amendment proposed to be made, supported by an affidavit of its truth, and some explanation of the reason why the matter proposed to be added was not originally inserted." The bill in this case prayed for the issuance of a writ of injunction restraining appellee from mortgaging, incumbering, or otherwise disposing of the leasehold estate mentioned, and was properly verified by the affidavit of complainant. It was sworn to that it might be used in procuring an injunction, as well as evidence, upon subsequent motion to dissolve the same. It would have been entirely competent for complainant at any time to have moved for a preliminary injunction.

That he did not do so does not affect the nature or character of his bill. The motion for leave to amend was not accompanied by any amendment. No suggestion in writing or otherwise was made of the nature or character of the amendment proposed, or affidavit showing that any additional material matter existed or could be alleged, or accounting for its omission. Under the rule relating to amendment of sworn bills, the motion was properly denied.

But if it be conceded, as contended, that the bill is to be treated as an unsworn bill, the appellant is in no better position. The rule undoubtedly is that if the bill is not required by law to be sworn to, (and the fact of it being a sworn bill performs no office or effects no change from what it would be as an unsworn bill,) the verification of it by oath of the party will be disregarded, (Gordon v. Reynolds, 114 Ill. 132; Downey v. O'Donnell, 92 Ill. 561,) and amendments allowed, as if it was not sworn to. The usual practice upon sustaining a demurrer to a bill of this character is to allow amendments as a matter of course, upon such terms, as the court may deem proper, (chapter 22, § 37, Rev. St.,) and within such reasonable time as may be fixed by the court, as was done in this case. Here the appellant failed to make his amendment within the time prescribed, and the dismissal of the bill would follow as a matter of course. The application was for the affirmative exercise of the discretion of the chancellor in appellant's behalf. He sufficiently accounted, as he must, for his own want of diligence, and so far met with the demands upon him. But more was required. The discretion could be exercised only in furtherance of justice. Its exercise was warranted only when necessary, or apparently necessary, to prevent the consummation of wrong, and promote and further justice. Parties litigant have a right to insist that litigation shall not be unnecessarily prolonged, and, unless there was some meritorious reason for further delay, the defendant might rightfully demand the dismissal of the bill, and thus end vexatious litigation. As before indicated, appellant

wholly failed to show, not only what amendment he desired to make, but that any amendment could in fact be made to the bill which would obviate the objection to it in matter of substance. It would seem too plain for argument that, before a chancellor could say an amendment should be allowed as in furtherance of justice, he must be apprised of the nature of the amendment to be made. For aught that appeared, the amendments proposed may have been of the most frivolous character, calculated to harass and annoy the defendant by prolonging the litigation and increasing the expense. In such a case no one would contend that the amendment should be allowed. There is no hardship in requiring a party who is in default, and invoking the discretion of the court, to present with his application for leave the amendments proposed to be made, or otherwise apprising the court of what they are, so that the court may intelligently determine the propriety of allowing or disallowing them. There was nothing here shown upon which the court could properly exercise a discretion to allow amendments to the bill, and the order of the court was therefore proper. Upon the disallowance of the motion for leave to amend, the order of the dismissal properly followed, and its affirmance by the Appellate Court was right. Other errors are assigned, but all of the points made requiring consideration are met by the foregoing.

The judgment of the Appellate Court will be affirmed.

PRIMMER v. PATTEN,

32 Ill. 528.

(1863.)

[530*] Walker, J. The first question which we propose to consider is, whether the bill of discovery contained such allegations as required the court below to grant an injunction staying the proceedings at law until the discovery was had. The bill alleges the pendency of the suit; [531*] that pleas had been filed,

setting up a failure of *consideration, with notice by the plaintiffs at the time they purchased the note; that they purchased the note after its maturity; also a plea that the payee of the note received the conveyance of a town lot in satisfaction and discharge of the note by a written release, and that plaintiffs had notice at the time they purchased; that replications were filed and issues joined. The bill further alleges that complainant was informed and believed that the note was indorsed after it became due and payable, and that plaintiffs knew of all the facts set up in the pleas when they purchased the note upon which the suit had been instituted. That Lasater, the payee of the note informed plaintiffs that the consideration had failed.

It will be observed that the bill fails to allege that the averments in the pleas, or that the information given by the payee of the note to the assignees, was true. Nor does the bill, outside the averments in the pleas, allege facts showing a failure of the consideration for which the note was executed. Neither does it allege that complainant expected or believed that he could prove by defendants, that Lasater informed them at the time he indorsed the note, that the consideration had failed. The bill should have alleged that the facts averred in the pleas, or such of them as showed a defense, or other sufficient facts, were true. It is likewise defective in failing to allege that he expected to establish their truth by the discovery sought by the bill. It is true that he says in his bill, that he has no witness by whom he can prove the facts set up in the pleas, except by Lasater or the plaintiffs in the suit at law, but he fails to allege that he can prove them by these parties. It may possibly be inferred that he expects to prove them by the defendants to the bill, but there is no such positive allegation. This fails to conform to the rules of pleading. In chancery, as at law, all facts must be clearly and positively averred in pleading.

Again, the bill is defective in its frame, as it contains no prayer for an injunction. It has a prayer for

discovery and for a summons to the next term of the court, but it does not ask that the suit at law may be stayed until the coming in of the answer. On this bill, as it was framed, the court below would *have erred in granting an injunction. No er- [532*] ror is perceived in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

ANGELO ET AL. v. ANGELO ET AL.

146 Ill. 629.

(1893.)

Wilkin, J. This is an appeal from a decree of the court below on the bill of appellees against appellants, setting aside a tax deed, and ordering certain lands sold for the payment of rent found to be due from William H. Angelo to Charlotte Aldridge. It appears from the pleadings in the case that certain real estate was conveyed in September, 1871, to the complainant, Oscar N. Angelo, in fee, subject to a life estate in his parents, William H. Angelo and Charlotte Angelo, now Charlotte Aldridge, as tenants in common. These life tenants entered into possession of the land, and William H. continued to occupy the same to the bringing of this suit. Charlotte separated from her husband, obtained a divorce, and intermarried with one Aldridge, and has not occupied any part of the premises for several years. Taxes assessed against the land remained unpaid, for which it was sold in May, 1889, and purchased by the defendant Mary Stewart, who, in due course of time, took a tax deed for the same. The bill seeks to set aside that deed, alleging for cause that it was obtained through collusion and fraud of Mary Stewart and William H. Angelo. It appears that in June, 1890, Charlotte Aldridge, on a bill by her against William H., obtained a decree for $846.48, for the use of her part of the common property. The present bill was filed August 5, 1891, and seeks to recover not only rents due since that time,

but also the amount of the former decree, and prays that the interest of William H. be sold for the purpose of paying the same. The defendants answered separately, each denying that there was any collusion or fraud on their part in regard to the sale of the lands for taxes, or in obtaining the tax deed by Mary Stewart. William H. further denied that the complainant Charlotte was entitled to recover from him any rents or profits of the land. He also set up against the prayer for a sale of the premises a homestead right in his interest. On the twelfth of October, 1892, a decree was rendered, reciting that said tax deed "was and is void because of defects in the notice of the sale for taxes, and the same is therefore annulled and set aside as a cloud upon the title to said land, but * * * that in equity the said Mary Stewart is entitled to have her money so advanced repaid to her out of the proceeds of the sale of said land," etc. It also confirmed the decree of June, 1890, and decreed that the defendant William H. should pay the complainant Charlotte an additional amount of $175, as rent, making in all the sum of $1,021.48, and ordered the premises sold for the payment thereof, the sale to be free from any claim of homestead by William H. It is insisted that the decree is erroneous on both branches of the case.

Clearly, the order setting aside the tax deed cannot be upheld, for the reason that it is based upon a ground entirely foreign to the issues in the case. There is no allegation in the bill that the notice of the tax sale was defective. The sole and only ground upon which it seeks to avoid the sale and deed is the misconduct, fraud and collusion of William H. Angelo and Mary Stewart, in whose name the deed was taken. The decree, in effect, finds that issue for the defendants, but then goes entirely outside the bill, and sets the deed aside because of defects in the notice. This was clearly error without reference to the proofs. The rule that proofs without corresponding allegations are in equity as unavailing as allegations without proofs, is familiar to every lawyer.

On the other branch of the case the bill is fatally defective, and the demurrer filed to it should have been sustained. It is a bill by one tenant in common against another to recover rents and profits, or to recover for use and occupation. It does not attempt to show that the defendant received rents and profits from a third person; that he rented the land, or any part of it; or even what the rental value of it was during the time charged for. No attempt whatever is made by it to show that the defendant refused to allow the complainant to occupy the premises, or to control her interest in the same, or that she made any effort or attempt to do so. It does no more than to aver that the defendant occupied the common property, and the complainant did not. No facts are alleged upon which to base the prayer for a sale of the interest of the defendant, even if the bill were otherwise sufficient; neither is it in any way shown that this bill is necessary to enforce the collection of the former decree. In short, the bill shows on its face that it was filed without any regard to well-established rules of law governing the rights of co-tenants. At the common law one tenant in common could not be compelled to account to another for rents and profits, to remedy which hardship the Statute of 4 Anne, chap. 16, was enacted. Freem. Co-tenancy, § 270. To the same effect is our statute (§ 1, chap. 2, p. 187, 1 Starr & C. St.) The remedy is by action to compel an accounting, now almost, if not universally, pursued by bill in equity, and expressly authorized by the eighteenth section of the chapter or our statute above referred to. The liability of one co-tenant to account to another may arise either from receiving from a third party more than his share of the rents and profits, or from his appropriating to his own use more than his proportion of the common estate. See Freem. Co-tenancy, § 272. It is impossible to tell upon which of these grounds the liability is based, but it is clear the bill is insufficient in any view. Clearly, it makes no case on the first ground, for the reason, as already stated, it wholly fails to show the receipt of any rents

by William H. It is equally defective on the second, because it does no more than show occupancy by the defendant, and forbearance to occupy by complainant. Chapin v. Foss, 75 Ill. 280; Boley v. Barutio, 120 Ill. 192, 11 N. E. Rep. 393, and cases cited. Moreover, no attempt is made to state the rental value of the land. Again, there is no such thing known to the law as a lien, in the first instance, in favor of the complaining tenant, against the interest of the other, for rents and profits. Stenger v. Edwards, 70 Ill. 631. But it is useless to pursue this inquiry. No one can seriously contend that an account could be stated between these parties on this bill if every fact stated in it were admitted to be true. The case is very meagerly presented by the abstract, and the argument on behalf of appellant on this branch of the record is confined to a discussion of the homestead rights of William H. Angelo, as against the decree of sale. In our opinion, that question it not reached, for the reason that no right of action is shown by the bill, and, if there had been, a peremptory decree for the sale of the land would have been erroneous.

The decree of the Circuit Court is reversed, and the cause remanded.

WHITE v. MORRISON,

11 Ill. 361.

(1849.)

Treat, C. J. This decree can not be affirmed. The case shows a clear right in the complainant to a foreclosure of his mortgage, unless the defendant Butler, made full proof of his defense. He alleges in his answer, that he had acquired the legal title to the mortgage premises, by virtue of a sale and sheriff's deed, founded on a judgment recovered against the mortgagor before the execution of the mortgage. The sheriff's deed, although referred to as an exhibit in the answer, does not appear to have been produced and proved. If introduced and proved as an exhibit,

on the hearing, it would have been filed with the papers of the case and copied into the transcript sent to this court. Holdridge v. Bailey, 4 Scammon, 124. But it is contended that the existence of the judgment and the proceedings under it, is admitted by the bill. Such is not the fact. The bill states that the defendant, Butler, pretends that he has purchased the premises, under a judgment older than the mortgage, [*365] and then charges *that it would be inequitable in him to set up the purchase to defeat the mortgage, inasmuch as he had agreed to pay off the mortgage. This statement does not dispense with proof of the allegations of the answer. It is not an admission that there was such a judgment, or that such proceedings were had under it. The bill anticipates a particular defense, without conceding it to be true. We are asked, however, to presume that proof of the defense was made orally at the hearing, under the provisions of the act of the 12th of February, 1849, which declares "that thereafter, on the trial of any suit in chancery, the evidence on the part of either plaintiff or defendant may be given orally, under the same rules and regulations as evidence in cases at common law; provided, however, that depositions taken in pursuance of law may still be read in evidence, as if this act had not been passed." Acts of 1849, page 133. Previous to the passage of this act, the testimony in contested chancery cases, was taken down in writing in the form of depositions, except where the witnesses were examined orally before a master, and the facts proved by them reported to the court, and when the proof of exhibits was made *viva voce* at the hearing. And the depositions, the master's report, and the exhibits were filed, and made part of the record of the case. M'Clay v. Norris, 4 Gilman, 370. We are of the opinion that this act was only designed to change the mode of taking testimony, and not to dispense with the necessity of the testimony appearing in the record. The parties are permitted to produce their witnesses in open court, and have them examined orally. The object was to avoid

the inconvenience, expense and delay attending the preparation of a case for hearing, where the evidence must be taken by depositions. When this statute is acted on, the testimony of the witnesses, or the facts proved by them, ought still to appear in the record. It may be stated in the decree; in a bill of exceptions; in a certificate of the judge, or in a master's report. We conceive it to be the duty of the Circuit Court to see that the testimony is incorporated in the record, in some one of these ways. This court will not presume that any other proof was made than what is thus stated in the record. In this case, the decree recites that the cause was heard on the bill, answer, replication, exhibits and depositions. The record fails to show that *any proof was made of [*366] the sheriff's deed. The exhibits referred to in the decree must be understood as including only those appearing in the record. For this defect in the proof of the defendant, the decree must be reversed. Instead of a decree being entered in this court, the cause will be remanded, that the parties may have an opportunity to present the whole case on the merits. It may not be improper to make some further suggestions respecting the case. It was insisted on the argument that the complainant was entitled to a decree of foreclosure, even if the allegations of the answer were true, inasmuch as he proved that the purchase under the judgment was made with the money of the mortgagor. If such was the fact, Butler can not assert title under the sheriff's deed, to the prejudice of the mortgage, because, in equity, it was the purchase of the mortgagor, and inured to the benefit of the mortgagee. But the complainant has not made a case by his bill, that will authorize him to defeat the purchase on this ground. He seeks to avoid the purchase on the ground that Butler was personally liable for the payment of the mortgage. He can not allege one cause for relief against the purchaser, and make out his case by proof of a different one. His proof must correspond with the allegations he has made, and not be inconsistent therewith. He must

stand or fall with the case made in his bill. M'Kay v. Bissett, 5 Gilman, 499. Special replications in chancery are now disused. A general replication only puts in issue the truth and sufficiency of the matters stated in the bill and answer. If it is necessary for a complainant to put in issue any facts on his part, in avoidance of matters set up by the defendant, he must do it by proper charges in his bill. He may, in the original bill, anticipate the defense that will be made, and allege any matter necessary to explain or avoid it; or, omitting all reference to the defense, he may, on the coming in of the answer, introduce the new matter into the case, by an amendment to the bill. Story's Eq. Pl., sec. 878; Tarlton v. Vietes, 1 Gilman, 470.

The decree of the Circuit Court will be reversed, with costs, and the cause remanded, with leave to the complainant to amend his bill.

Decree reversed.

WINSLOW v. NOBLE,

101 Ill. 194.

(1882.)

Mr. Chief Justice Craig delivered the opinion of court.

This was a bill in equity, brought by Thomas J. Noble, and Sarah J. Noble, his wife, against Nathaniel N. Winslow, and Sarah L. Winslow, his wife, to enjoin them from prosecuting an action of forcible detainer, which was then pending before a justice of the peace, to recover possession of a certain tract of land in McLean county, consisting of 45 90/100 acres which was then occupied by the complainants.

There is no substantial dispute between the parties in regard to the facts. Noble, as appears, a few years ago owned 160 acres of land in Piatt county, upon which he had given a certain trust deed to secure a certain amount of money which he owed to one Wing. This land he traded to John R. Stewart for 45 acres

of land in McLean county— the land in dispute. In the trade Noble agreed to remove the mortgage on the Piatt county land, and Stewart reserved a vendor's lien on the 45 acres, to secure the performance of Noble's agreement. Noble moved on the land in McLean county, and thereafter he occupied it as a homestead. Noble failing to pay off the mortgage on the Piatt county land, Stewart, at the request of Noble, found a man (Daniel Grow) who was willing to loan the money to be used for that purpose, and take a mortgage on the 45 acres of land. Noble and his wife agreed to give a mortgage releasing the homestead, to secure the money loaned by Daniel Grow, and a mortgage was prepared, executed and acknowledged; but the acknowledgment was defective in this, it failed to show that T. J. Noble acknowledged the release of the homestead. This defect was not, however, known by Grow or the Nobles. The money loaned not having been paid when due, Grow, in February, 1878, filed a bill in the McLean Circuit Court to foreclose the mortgage. The Nobles did not appear. A decree by default was rendered, and in May, 1878, the premises were sold, and bid off by Grow for the amount of his debt, and costs. In July, 1879, Noble, finding that he could not redeem the premises from the sale, went to appellant N. N Winslow, and induced him to buy the place at $50 per acre, which amounted to the sum of $2,250. There was then due Grow $2,000, but he agreed to throw off $150. Winslow then paid him $1,850, and took an assignment of the certificate of purchase, and accounted to Noble for the balance of the purchase price of the land—$400. Winslow had a deed made to his wife on the certificate of purchase, and as a part of the trade leased the premises to Noble from the 1st day of July, 1879, to the 1st day of March, 1880, for eight per cent. on the amount he had paid for the property, and a written lease was executed by the parties. Before the expiration of the lease Noble discovered the defect in the acknowledgment of the mortgage, and refused to surrender possession of the

premises, and upon being sued for possession filed this bill.

There is no controversy over the proposition that a homestead is not exempt as against a debt incurred for the purchase thereof. But the money Grow loaned Noble, for which a mortgage was taken, was not used in the purchase of the premises—it was in no sense purchase money. The fact that Noble may have used the money borrowed of Grow to pay off a mortgage on the Piatt county farm, which he agreed with Stewart to pay, as a part of the trade under which he obtained the land in question, does not make the money obtained of Grow purchase money. Stewart sold the premises to Noble, but he received no part of the money Grow loaned Noble. The premises were purchased long before the Grow debt was made, and hence the Grow debt could not be incurred for the purchase of the premises.

Appellant Winslow filed a cross-bill, in which it was, in substance, alleged, that T. J. Noble acknowledged (before the notary who took the acknowledgment of the mortgage) the release and waiver of his homestead rights in and to the premises described in the mortgage, and that by a mere clerical error of the notary who drew the mortgage, the certificate of acknowledgment failed to state the truth in regard to the acknowledgment. The cross-bill prayed that the certificate of acknowledgment be performed according to the truth. The complainants interposed a demurrer to the cross-bill, which the court sustained, and this is relied upon as error.

We shall not stop to determine whether the court erred in sustaining the demurrer to the cross-bill, or not, as a correct decision of the case must rest upon other grounds, which will dispose of the case upon its merits, without passing upon that question.

Winslow, it will be remembered, became the purchaser of the certificate of purchase from Grow at the instance and request of Noble,—not for the purpose of speculating out of the land, but for the purpose of aiding Noble to save something out of the

land, which had been sold, and the redemption was about to expire, and all would then be lost to him, as he then supposed. By inducing Winslow to purchase the certificate of purchase, and thus obtain the title to the land, Noble realized $400 by the transaction. Now, after Noble has induced Winslow to make this purchase and pay all the land is worth, and has obtained from Winslow $400 and put it in his own pocket will equity allow him to repudiate what he has done, retain the money Winslow paid for the land, and recover, by a decree in chancery, almost one-half in value of the land which he induced Winslow to purchase? We do not believe any precedent can be found which would sanction such gross inequity and injustice.

It is an old and well established rule in equity, that he who seeks equity must do equity. Let us apply this rule to the present case and see whether the decree can be sustained. Before Noble could call upon a court of equity for relief, justice and right would require him to refund Winslow the amount of money he had paid at the request of Noble, and surely equity would not allow Noble to retain the money Winslow had paid him, and at the same time give him the land. This would be no less than sanctioning a palpable fraud.

There is another well established rule in equity which ought not to be overlooked in a case of this character, which is, that a party must come into a court of equity with clean hands, otherwise his bill will be dismissed. (Thorp v. McCullum, 1 Gilm. 614.) Can it be said that Noble's hands are clean so long as he holds Winslow's money? We think not.

There is yet another feature in this case which precludes a decree in favor of the complainant in the bill. He not only induced Winslow to purchase the land, but as a part of the purchase contract he surrendered the possession of the property to him, and became a tenant of Winslow from July 8, 1879, to March 1, 1880, at a stipulated rent. Such is the effect of the

contract which was executed by the parties. It reads as follows:

"Bloomington, Ill., July 8th, 1879.

"I have this day bought of T. J. Noble his farm, it being the land that Daniel Grow now holds a certificate of sale of, and occupied by said Noble, for which I agree to pay $50 per acre, as follows, to settle with and pay Mr. Grow the money due him, and pay the balance to said Noble. I further agree to let said Noble hold possession of said farm until March 1st, 1880, for which he is to pay me, *as rent,* 8 per cent. interest on purchase money, from time I pay the money until March 1st, 1880. I further agree to give said Noble the first refusal to rent the said farm for one year or more, from March 1st, 1880, as may be agreed upon hereafter.

(Signed.) N. N. Winslow,
T. J. Noble."

In Brown v. Coon, 36 Ill. 243, where the homestead had been sold by the owner thereof, by deed which did not release the homestead as required by statute, it was held, as possession was delivered under the deed, the title passed,—that the homestead right was lost by the abandonment of possession to plaintiff's grantee, as completely as if there had been a relinquishment in the form required by the statute. Here, Noble made no deed because a deed was not necessary, as the title had passed on the foreclosure sale. He did not move off the premises and surrender up actual possession to Winslow, but when he became Winslow's tenant under a written lease, the legal effect was the same as if he had moved off and Winslow had moved on the premises.

We are, therefore, of opinion that Noble abandoned his homestead rights. Indeed, under the language of sec. 4 of the Homestead act, Rev. Stat. 1874, p. 497, we do not see how Noble can claim homestead rights in the premises. It declares: "No release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder, and his or her wife or husband, * * *

and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned, or given pursuant to the conveyance." Here, when Noble leased the property and became the tenant of Winslow, possession, within the meaning of the statute, was given pursuant to the conveyance. Eldridge v. Pierce, 90 Ill. 474.

What was said in Booker v. Anderson, 35 Ill. 66, can have no bearing here, as the statute under which that decision was rendered did not contain the clause, "or possession is abandoned, or given pursuant to the conveyance," as the statute now does.

In any view we have been able to take of the case, we perceive no ground upon which the decree can be sustained.

The decree will be reversed, and the cause remanded, with directions to the Circuit Court to dismiss the bill.

Mr. Justice Scott dissenting.

Decree reversed.

NEWELL v. BUREAU COUNTY,

37 Ill. 253.

(1865.)

Mr. Justice Breese delivered the opinion of the court.

The only question presented by this record, is, as to the propriety of sustaining a general demurrer to the bill of complaint of appellants.

It is insisted by appellants that inasmuch as the demurrer was general to the whole bill, it admitted all the facts stated in the bill to be true, and as fraud and usury were charged, those facts were admitted, and therefore the demurrer should have been overruled.

The rule is, as we understand it, and have repeatedly stated, that the effect of a demurrer is to admit all facts properly pleaded, but not inferences of law from those facts. Stow v. Russel, decided at

April term, 1864; I Daniels' Ch. Pr., 601 Mills et al. v. Brown et al., 2 Scam. 549.

The charges of fraud and usury are general, and do not show the facts on which the charges are predicated, consequently, it would be impossible to answer them. That such and such facts constitute fraud, or usury, as the case may be, may be but an inference drawn by the pleader from the facts, and as such inferences are not admitted by the demurrer, the facts must be distinctly charged. We fail to perceive in any of the allegations of the bill, any specific charge of fraud or usury such as would be admitted by a general demurrer to a bill, or of such a nature as to call for an answer.

The whole case rests upon the policy adopted by the state in regard to the disposition of the swamp lands granted to the state by the United States, and by the state to the several counties in which those lands are situated.

[*257] We had occasion, in the case of Supervisors of Whiteside Co. v. Burchell et al., 31 Ill. 68, to examine this whole subject, and we came to the conclusion, to which we adhere, where a party purchased swamp lands from a county in 1856, the year in which appellants purchased, and executed his notes for the absolute payment of the purchase money, he had no remedy to compel the county to appropriate the proceeds of the sales of such lands to their reclamation, as was contemplated by the legislation on the subject, in force at the time of his purchase; but his rights in that regard are to be determined by the policy subsequently adopted by the Legislature, which placed the whole subject of the control and disposal of these lands, and the appropriation of their proceeds in the hands of the several county authorities, and released them from all the liabilities and obligations theretofore imposed upon them, respecting them.

From this, it follows, no plea of want of consideration can be sustained to a note given for the land, the reclamation of these lands being understood to be a

part of the consideration of the note at the time the same was executed.

Perceiving no sufficient charge of fraud, usury, or want of consideration in the bill of complaint, or any other fact to weaken the claim of the county to payment of the note and mortgage, the bill appears without equity, and the court probably sustained the demurrer to it, and its judgment must be affirmed.

Decree affirmed.

SMITH v. BRITTENHAM,

98 Ill. 1888.

(1881.)

Mr. Justice Sheldon delivered the opinion of the court.

This was a bill in chancery, filed in the Circuit Court of DeWitt county, on the 14th day of August, 1874, by Sarah J. Brittenham against Columbus C. Smith, to have set aside a conveyance of 237 acres of land, made by her to him on the 12th day of January, 1869, in exchange for a stock of goods, on the ground of alleged fraud on the part of Smith in the making of the contract for such exchange.

Personal service of summons was had on Smith, and he failing to appear and answer, the bill was taken for confessed against him at the August term, 1874.

At the following December term an order was made dismissing the cause for want of prosecution, which order, two days afterward, at the same term, was set aside, and the cause reinstated without notice to Smith. He did not appear in the court until after the final decree. At the December term, 1876, the cause was referred to the master, to take testimony, etc., who reported that the value of the goods received by the complainant was $4,500, and the rental value of the land during the time the defendant had held the same under the deed, to be $5,300, and at the same December term the court rendered a decree cancelling the deed and setting off the value of the goods against the rent

of the land. At the next March term Smith entered a motion to vacate the decree and for leave to answer the bill. The court overruled the motion, from which decision Smith prosecuted an appeal to this court, and the ruling of the Circuit Court in refusing to set aside the decree and admit an answer, was affirmed. See Smith v. Brittenham, 88 Ill. 291.

This court holding that this appeal did not bring before it anything but the decision of the Circuit Court overruling said motion, and the Appellate Court having in the meantime been organized, afterward, Smith sued out a writ of error from the Appellate Court for the Third District, to the Circuit Court, and filed in the Appellate Court a complete copy of the record, and on a final hearing in that court at the November term, 1878, the decree of the Circuit Court, in the respect of ordering a writ of assistance to issue, was reversed, and in all other respects said decree was affirmed. The cause was remanded to the Circuit Court, where such proceedings were had, at the March term, 1879, that another writ of assistance was ordered by the Circuit Court. From this order Smith again appealed to the Appellate Court, and that court at the May term, 1879, affirmed the order of the Circuit Court, awarding the writ of assistance.

From this judgment of affirmance Smith again appealed to this court, and the judgment was affirmed. See Smith v. Brittenham, 94 Ill. 627. Subsequently this present writ of error was sued out to the Appellate Court, by which the entire record in the case is brought up, and plaintiff in error, Smith, challenges the correctness of the decision of the Appellate Court at its November term, 1878, affirming the decree of the Circuit Court except in the respect of the writ of assistance.

Preliminarily, defendant in error insists that this writ of error will not lie, in view of the previous proceedings above recited, which have been had in the case,—that in consequence of them the decree of the Circuit Court has become *res adjudicata,* and plaintiff

in error therefore precluded from bringing in question its correctness.

It is very clear that there has never been, in fact, any adjudication of this court in respect to the correctness of that decree. On the first appeal to this court we distinctly declared that there was nothing before us for consideration but the decision of the Circuit Court overruling the motion to vacate the decree and for leave to answer, and said we forbore to remark upon the merits of the case. On the second appeal to this court, we said the appeal was not from the judgment of affirmance of the Appellate Court at its November term, 1878, of the decree of the Circuit Court except as to the writ of assistance, but that it was from the Appellate Court's judgment of its May term, 1879, affirming the order of the Circuit Court awarding another writ of assistance, and that the entire record in the cause was not before us.

Only the two rulings of the Circuit Court then have to be reviewed by this court—the denial of the motion to vacate the decree, and the order awarding a writ of assistance—and it appears that this court declined to consider anything further. Plaintiff in error is entitled to have reviewed the in this court the propriety of the main decree of the Circuit Court, and we do not think that he should be barred from his present writ of error for that purpose, by anything which has transpired in the case heretofore.

The plaintiff in error, Smith, makes the point, that after the dismissal of the cause in the Circuit Court at the December term, 1874, the subsequent vacating of the order and reinstating of the case at that term was erroneous without notice to him of the motion for that purpose. We do not so think. Smith having before been brought into court by service of process, was bound to take notice of all the orders which were made in the cause at that same term of court, and as well after as before the making of the order of dismissal.

We come then to the question of the correctness of the decree of the Circuit Court. The default of Smith

admitted such facts as are properly alleged in the bill, and no more, and the inquiry is whether the bill states sufficient facts to wararnt the decree.

We give the bill in its material part. After describing the land and being seized of it, the bill proceeds:

"Oratrix would further represent that while so seized of the land aforesaid, Columbus C. Smith, on or about the 1st day of January, A. D. 1869, made a proposition to the husband of oratrix to trade and exchange a stock of goods then owned by said Smith, for said land, the said Smith then and there proposing to said husband to buy said land at the sum of $14,000, and pay for the same in said stock of goods, at their original cost, and that the same were to be invoiced and the difference either way to be paid by the said parties; that after such negotiation the said proposition was communicated to oratrix; that upon the faith of such representations, and undertakings on the part of said Smith, as to the invoice and price of said goods, oratrix consented to make such trade, and in consummation thereof, oratrix did, on the 12th day of January, 1869, in connection with her husband, make, execute and deliver to said Smith, a deed of general warranty for said land, a copy of which is hereto annexed and asked to be considered a part of this bill, and that in pursuance of the rights and powers of said deed, the said Smith entered into and took possession of said lands, and has continued in such possession ever since, receiving the rents and profits of the same.

"Oratrix would further state that after oratrix consented to make said exchange upon the faith of said representations, the said Smith, to injure and defraud oratrix, made a false and fraudulent inventory of said goods, and then and there in such inventory did take advantage of said John A. Brittenham, he being at the time, to some extent, unsound in his mind, and being incapable because of such unsoundness to protect the interests and rights of oratrix, and oratrix charges that a false and fraudulent inventory of such goods was made for the purpose of cheating oratrix, and that in such inventory, the same being false, oratrix

was cheated out of a large amount; and oratrix further states and charges that a large amount of goods included in the inventory was not delivered to her, or her said husband, or to any person for their use; but on the contrary, the value of the goods delivered was $5000 less than the amount of inventory. Oratrix further states that said goods were not worth to exceed $4000; that the amount not delivered of the goods as aforesaid, and the falsity of said inventory, reduced the actual value of the goods received by oratrix to the said amount of $4000; that oratrix was ignorant of said fraudulent act of said Smith until a short time—to-wit: five days—before the meeting of the last term of this court; that oratrix was not skilled in business of merchandise or the value of dry goods, and that owing to said condition of her said husband, he was wholly unfit to detect said fraud or protect the rights of oratrix in the consummation of said trade; said Smith still has the title and possession of said land; that the rents and profits of said land since the said Smith got the same, have been and are sufficient to pay said Smith whatever said goods were worth as delivered to oratrix under said trade. Forasmuch as your oratrix is without an adequate remedy, except in a court of equity, oratrix asks that said Smith be made defendant herein, that he may be required to answer this bill, but not on oath, answer on oath being waived, that an account be stated between the parties as to the value of said goods and the use of said lands, that if anything be due defendant on such accounting, oratrix is ready and waiting to pay said defendant, that in consequence of the deception and bad faith as aforesaid the defendant be required to reconvey said land to oratrix, and that said sale be rendered null and void; and your oratrix asks such further relief," etc.

It will be seen that the bill does not show that the goods traded by Smith for the land have been returned or offered to be returned to him, or any excuse for not doing so. In Buchenau v. Horney, 12 Ill. 338, this court said: "A party can not rescind a contract of

sale, and at the same time retain the consideration he has received. He can not affirm the contract as to part, and avoid the residue, but must rescind *in toto*. He must put the other party in as good condition as before the sale, by a return of the property purchased. There may be an exception when the subject matter of the sale is entirely worthless. But if it is of any benefit to the seller, the purchaser must restore it before he can put an end to the contract." And see Wolf v. Dietzsch, 75 Ill. 205, among many other cases in this court, to the same effect.

Mr. Benjamin, in his work on Sales, sec. 452, says upon this subject: "And if he (the buyer of goods) has paid the price, he may recover it back on offering to return the goods in the same state in which he received them. And this ability to restore the thing purchased unchanged in condition is indispensable to the exercise of the right to rescind, so that if the purchaser has innocently changed that condition while ignorant of the fraud, he can not rescind."

If there be any excuse in the case which could be accepted for not making, or offering to make return of the goods, none whatever is shown by the bill, so that the general rule as above stated must apply here; and under that rule the bill makes no case of a right to rescind the contract.

Aside from the above we are of opinion the facts alleged in the bill are not sufficient to authorize the decree. There is an attempt to set up two matters as ground for the rescission of the contract—the making of a false and fraudulent inventory of the goods, and the not delivering of a large amount of goods included in the inventory. In respect to the last the charge is, "that a large amount of goods included in the inventory was not delivered to her,—but, on the contrary, the value of the goods delivered was $5000 less than the amount of the inventory."

Now, taking this whole charge together, it really does not charge that any goods included in the inventory were kept back. The attempted statement that there was, in the first clause, is rendered valueless as

an allegation of such a fact by the last clause stating what was done in that regard, namely, "but, on the contrary, the value of the goods delivered was $5000 less than the amount of the inventory." So that, taken altogether, the whole charge in that respect, as we read it, is, that the value of the goods delivered was $5,000 less than the amount of the original cost price as appearing by the inventory. The amount of the inventory, we take to be the amount of the inventory prices, and the inventory prices to be the original cost prices of the goods. If it be susceptible of any other meaning, such meaning is not obvious, and the above is the meaning we conceive, which, as against the pleader, is entitled to be put upon that expression.

Now, what does it matter in the way of entitling complainant to relief, that the value of the goods received was $5,000 less than the amount of the inventory—the amount of the original cost prices of the goods? The contract price for the goods was the original cost of the goods, not the value of the goods, and the discrepancy between the value of the goods received and the original cost price of the goods, would furnish no ground for any relief under the contract.

The other charge is in the general terms that defendant made a false and fraudulent inventory of the goods, in which complainant was cheated of a large amount, without at all naming in what respect the inventory was false and fraudulent. Charges of fraud should not be general, but the facts should be stated on which the charges are based. Newell v. Bureau Co., 37 Ill. 253.

After alleging that the goods were not worth to exceed $4,000, then the whole amount of damage, as resulting from both the said causes of complaint, is stated to be, "that the amount not delivered, of the goods, and the falsity of said inventory, reduced the actual value of the goods received by oratrix to the said amount of $4000." What damage or ground of complaint does this show under the contract? Reduced the value of the goods from what sum, or from what?

The actual value of the goods may not have been

more than $4,000, and yet the original cost price, at which they were to be taken, have been as much as $14,000, the full agreed price for the land. As already observed, the value of the goods is unimportant. It is their original cost price which is the essential thing. It is noteworthy that the bill fails to state anything as to the original cost of the goods, or as to the inventory price, or as to any discrepancy between the inventory price and the original cost. It but states the value of the goods received, proceeding, seemingly, upon the theory that the discrepancy between their value and that of the land, was ground sufficient for having the contract rescinded, or at least that that was enough of damage to show. There must be damage, as well as fraud. They must concur, for the annulment of a contract. The facts alleged do not show damage. The bill does not make a case for the rescinding of the contract of sale of the land.

It is said that proofs taken by the master show a case. Without looking into them to see whether they do or not, it is not enough that they may do so,—they cannot supply the want of allegations in the bill. The decree must be according to the allegations as well as proofs, and, unless the bill states sufficient facts to warrant the decree, it cannot stand.

The judgment of the Appellate Court will be reversed, and the cause remanded, with directions to reverse the decree of the Circuit Court, and remand the case, with leave to amend the bill if complainant shall be so advised, and with liberty to answer.

Judgment reversed.

GOODWIN ET AL. v. BISHOP ET AL.

145 Ill. 421.

(1893.)

Craig, J. This was a bill in equity, brought by H. E. Lowe, trustee, and E. F. Bayley, successor, to foreclose a certain trust deed executed by Caleb Goodwin and Elizabeth Goodwin to secure seven promissory

notes, made payable to themselves, and indorsed to Alexander Bishop,—one note for $5,000, due in three years after date, and six interest notes for $175 each. The note of $5,000 was given for a loan of that amount of money loaned by Bishop to Goodwin, and the defense attempted to be set up in the answer was that the transaction was usurious. The answer, setting up usury, is as follows: "And these respondents say that they did not, nor did either of them, receive the full sum of $5,000 from said complainants at the time of making said loan, nor at any time, nor did they receive any money at the date of said notes and trust deed, and so these respondents say that the amount claimed by said complainants is largely tainted with usury." If a party to a bill in equity desires to set up and rely upon the defense of usury, he must allege the facts showing wherein the usury consists. A general charge of usury in an answer is not sufficient. Mosier v. Norton, 83 Ill. 519. The allegation of the answer may be true, and it by no means follows that the contract between the parties was usurious. The gist of the answer is that the defendants did not secure the full sum of $5,000, nor did they secure any money at the date of the notes. Suppose, however, the next day after the notes were executed, they secured $4,999, and allowed the mortgagee to retain $1 to pay for recording the mortgage, this would be in harmony with the facts disclosed in the answer, and yet usury could not be established in such a state of facts. Where the defense of usury is relied upon, the facts constituting the usury should, as a general rule, be clearly set up in the answer, and proved as alleged.

But it is said, if the answer was insufficient, the complainant ought to have filed exceptions. It is a rule of chancery practice, where an answer is defective, it must be excepted to; a demurrer is not allowable. Stone v. Moore, 26 Ill. 165. But where the answer is not under oath, exceptions will not lie, because such answer is not evidence for the party making it. Supervisors of Fulton Co. v. Mississippi & W. R. Co., 21 Ill. 366; Brown v. Mortgage Co., 110 Ill. 238.

But, even if the answer was sufficient, we do not think that the evidence established usury. Bishop loaned Goodwin $5,000, for three years, at 7 per cent. interest. Lowe testified that the money was disposed of as follows: "Out of this loan Mr. Goodwin received $110.65 in cash. I paid Mr. Ward $4,640.41 on May 8, 1889, to take up his mortgage on this property. I paid the taxes,—$73.94. I paid Bayley & Waldo $50, for examination of title, etc., by the direction of Mr. Goodwin, and Mr. Goodwin paid me a commission of $125." These items make up the $5,000 loaned by Bishop, and it will be borne in mind that, at the time the loan was made, 8 per cent was a legal rate of interest. In order, therefore to make out that a greater rate was exacted than 8 per cent., it was necessary to prove that Bishop or his agent received the $50 and the $125 mentioned by Lowe in his evidence. As to the $50, it was paid by the direction of Goodwin to attorneys, for an examination of title to the property mortgaged; and under Ammondson v. Ryan, 111 Ill. 506, that was a legitimate transaction, and not usurious. As respects the other item, Goodwin paid that sum to Lowe for his services in procuring the loan. Lowe did not secure the money for Bishop, nor did Bishop, so far as appears, have any knowledge that Lowe secured the money. If Goodwin has seen proper to pay money to Lowe for his services, that did not render the loan made by Bishop usurious. Ballinger v. Bouland, 87 Ill. 513; Cox v. Insurance Co., 113 Ill. 385.

The court allowed a solicitor's fee of $250, and this is claimed to be erroneous. The deed of trust contains a provision that, in case of suit or proceeding for foreclosure, the proceeds of sale shall, among other things, be applied to pay an attorney's fee of 5 per cent. upon the amount secured. Under this clause of the deed of trust, the court allowed the amount complained of, and we think the action of the court was fully authorized.

In computing the amount due on the notes, the master in chancery computed interest from the date of the

notes, while it appeared from the evidence that the money was not paid over until a few days after the notes were executed. Objection being made, the court, on March 8, 1892, modified the report, and deducted $11.72 for excess of interest computed. At the same time, as the amount found due by the master was computed only to the time the report was filed, November 30, 1891, the court added $95, to make up the interest from November 30, 1891, to the date of decree, March 8, 1892. As interest had accrued after the report was filed, the court had the undeniable right to refer the cause to the master to determine the amount then actually due, or the court could, if it saw proper, compute the interest without a reference. Either course might be pursued, and, as the court chose to pursue the latter, we perceive no objection to the action of the court.

The judgment of the Appellate Court will be affirmed.

MONARCH BREWING CO. v. WOLFORD ET AL.

179 Ill. 252.

(1899.)

Phillips, J. On August 5, 1892, Frank Rezabek, through Theodore H. Schintz, borrowed the sum of $5,500, for which he made his principal note for that sum payable to his own order five years after date. The interest was to be at the rate of 6 per cent. per annum, payable semi-annually, which was evidenced by ten coupon notes, of $165 each, all payable to the order of the maker; and these, with the principal note, were by the maker indorsed. To secure the payment of these notes, the maker thereof and his wife made and executed to Theodore H. Schintz their deed of trust of the same date as the notes, conveying certain lands. On April 17, 1895, a bill was filed in the name of Frederick T. Zentner and Theodore H. Schintz, in the Superior Court of Cook county, to foreclose this trust deed, in which it was alleged that Zentner was the owner and holder of the principal note and the last six

of the coupon notes; that the first four coupon notes had been paid, but default had been made on that due February 5, 1895, because of which Zentner had declared a forfeiture, and the principal note, with the accrued interest, had become due under the provisions of the trust deed. A decree was rendered on that bill for the sum of $6,356.20, and sale ordered. After due notice, sale was made of the mortgaged premises to one Thomas Blaha for $7,500, which was approved by the court, and a certificate of sale made and recorded. The plaintiff in error had on August 17, 1893, recovered a judgment against the mortgagors for $1,055, with costs, in the Circuit Court of Cook county. Desiring to redeem from the sale, the plaintiff in error had issued a *pluries* execution upon its judgment, and placed the same in the hands of the sheriff of Cook county, with the requisite amount for redemption, viz., $7,951.25. On August 19, 1896, redemption was made, and on sale the amount of redemption was bid by plaintiff in error, and deed was made to it, which was filed for record November 16, 1896. On August 9, 1897, the defendant in error Anna M. Wolford filed in the Superior Court of Cook county her bill to foreclose the same trust deed to secure the same notes, alleging that she was the owner and holder of the principal note, and the last coupon, due August 5, 1897, and had always been such owner; that default had been made in the payment of said two last-mentioned notes. It was further alleged that the bill of Zentner against Rezabek was unauthorized by her; that she had never derived any benefit therefrom; that Zentner was not the owner of said notes, and never was; that he did not procure the filing of the bill, nor engage the attorney, Ives, who appeared in that case; that Ives was not solicitor for the owner of said notes; and that Zentner and Schintz had no controversy with Rezabek. In this last-mentioned bill the judgment, sale under first decree, the redemption, and the execution of the deed are set up, and the decree under which the first sale was made is alleged to be fraudulent and void for being wholly fictitious; and it asks to have the decree in

the first foreclosure suit, the master's certificate of sale, the redemption and sale thereunder on the *pluries* execution, and the deed thereon, held fictitious, fraudulent, and void, and to be declared a cloud on her title and subject to her claim, and prays a foreclosure. The plaintiff in error was made a party defendant, with other necessary parties, to said bill, and the sheriff made return on the summons of service on the plaintiff in error, a corporation, by delivering a copy thereof to its president. On October 26, 1897, a default of the plaintiff in error to the bill of defendant in error Wolford was taken, and a decree *pro confesso* entered, which decree found the facts, and granted the relief prayed for in the bill filed by said Wolford. A sale under this last-mentioned decree was ordered, and made on November 23, 1897, at which John B. Robertson, who is one of the defendants in error, became the purchaser, which sale was duly approved. On the face of the record, the proceedings under both bills, and for redemption from sale, were regular.

The plaintiff in error sues out this writ of error, and asks this court to review the last decree, because, it is claimed, the averments of the bill are insufficient to support the decree. Plaintiff in error insists that there is no sufficient averment of facts constituting fraud in the bill of defendants in error, but merely the averment that the first decree was fictitious and fraudulent. It also insisted the bill contains no sufficient averment that the notes were never out of the possession of complainant.

It is a well-settled rule that a defendant to a bill in chancery, where a default and decree *pro confesso* have been entered, may, on error, contest the sufficiency of the bill itself, or that its averments do not justify the decree. Gault v. Hoagland, 25 Ill. 241; Wing v. Cropper, 35 Ill. 256; Martin v. Hargardine, 46 Ill. 322; DeLeuw v. Neely, 71 Ill. 473; Hannas v. Hannas, 110 Ill. 53; Railroad Co. v. Ackley, 171 Ill. 100, 19 N. E. 222. The decree must not be broader than the averments of the bills, and those averments must be such as to justify the relief prayed. Under a decree *pro*

confesso, however, a defendant cannot, on error, allege the want or insufficiency of the testimony, or the insufficiency or amount of the evidence, that may have been heard by the court entering the decree. Gault v. Hoagland, *supra.* Where the defendants are persons not under disability, and a default is entered, a decree *pro confesso* follows as a matter of course. Such decree, if warranted by the averments of the bill, is unassailable.

The bill in this case alleges, in substance, that no such person as Frederick Zentner exists, and that the name is fictitious; that he was not, and never had been, the owner of the notes described in the bill filed in his name; that he did not engage Ives, the attorney who filed the suit, to do so; and that Zentner and Schintz had no controversy with Rezabek. The bill also alleges that complainant Anna M. Wolford has been the owner and holder of said $5,500 note and said trust deed from the time of said loan to Rezabek, August 5, 1892, continuously until the present time, and is now the legal holder and owner thereof. It also alleges the filing of a bill April 17, 1895, in the name of Zentner and Schintz, against Rezabek, the Monarch Brewing Company and others, wherein it was alleged that Zentner was the owner of said $5,500 note. It also alleges that complainant had no knowledge or information of said suit, and the proceedings under the same, until July 21, 1897, that she never employed Schintz or Ives to file any bill against Rezabek, and that she never adopted said proceeding, or derived any benefit therefrom. These are sufficient averments of fraud, and charge specific acts constituting the fraud. The ownership of the notes by this defendant in error is thereby sufficiently alleged. In Roth v. Roth, 104 Ill. 35, it was held: "It is not sufficient, as it has often been held by this court, for the purpose of successfully assailing a transaction on the ground of fraud, to charge fraud generally; but the complaining party must state in his pleading, and prove on the trial, the specific acts or facts relied on as establishing fraud." To the same effect are Newell v. Board, 37 Ill. 253, and Smith v.

Brittenham, 98 Ill. 188. Allegations that a bill to foreclose a mortgage was brought in the name of one not the owner, and without the knowledge or consent of the owner, and by which that owner is deprived of all benefit, are distinct averments of fraud. The averment that complainant was the owner and holder of the notes, and that she had always been such, is sufficient. The averments of the bill were sufficient to authorize the decree, which is not broader than the bill. We find no error in the record, and the decree of the Superior Court of Cook county is affirmed.

Decree affirmed.

TOLES v. JOHNSON,

72 Ill. App. 182.

(1897.)

Mr. Justice Sears delivered the opinion of the court.

This appeal is from a decree, which, upon sustaining a general demurrer to the bill of complaint, dismissed the same for want of equity.

The averments of the bill are substantially as follows:

That a judgment was entered by confession in the name of Jesse G. Wells, May 13, 1895, in the Circuit Court, against appellee John Alquist, upon three promissory notes, each of said notes made payable to the order of the State Bank of Chicago, and signed by appellees John Alquist and John Johnson. Each of said notes was indorsed as follows: "Without recourse, the State Bank of Chicago." A warrant of attorney was attached to each note authorizing any attorney of any court of record to enter judgment by confession on the note in favor of the holder against the makers thereof.

On the day the judgment was entered, John Alquist was the owner in fee simple of lot 19, described in the bill.

It is averred in the bill that said judgment was caused to be entered by said Jesse G. Wells, by the

procurement of said Johnson, against Alquist alone, with the intention of defrauding the said Alquist thereby, and for the purpose of enforcing the payment of said judgment out of the real estate aforesaid, and that Alquist had no knowledge of the existence of the judgment against him, and that Johnson, with the intention of defrauding Alquist and obtaining an undue advantage over him, obtained from the defendant, Wells, for the consideration of one dollar, an assignment of said judgment in the month of May, 1895.

That on June 23, 1895, John Alquist, by warranty deed, conveyed said real estate to Ludwig S. Bekken, and on July 31, 1895, Ludwig S. Bekken, by warranty deed, conveyed said real estate to appellant; that neither Alquist nor his grantees knew of the existence of the judgment, nor of the execution theeron, nor of the levy and sale of the real estate until after the expiration of twelve months from the sale. That on October 31, 1895, Johnson procured an execution to be issued on said judgment, and levied upon said real estate, and at the sale thereof bid in the real estate for the amount of the judgment, and gave the sheriff a receipt in full satisfaction of the execution and costs; that the sheriff retained only $13.78 for his costs and commissions, which sum was the total amount actually paid by the said Johnson for said certificate of purchase.

It is further averred in the bill, that Johnson fraudulently kept said proceedings, sale and purchase a secret from Alquist and complainant (appellant), and that the said proceedings and sale were a fraud upon the rights and equities of complainant. It is further charged in the bill, that Johnson knew on October 31, 1895, and before that date, that the complainant had purchased and become the owner of said premises.

The bill further avers that on January 11, 1897, J. J. Toles obtained a judgment against John Alquist, and as a judgment creditor redeemed from said sale and paid to the sheriff the amount due; that the sheriff, upon receipt of said redemption money, proceeded in

due form of law and sold the said real estate to J. J. Toles at public auction for the amount of the redemption money and the costs of sale, and in pursuance of the same, immediately after the sale, made a deed of the premises to said J. J. Toles.

The bill further averred that Ludwig S. Bekken and John Alquist, the grantors of appellant of the premises aforesaid, were each wholly insolvent, and that whatever judgment might be obtained against them, or either of them, could not be collected.

The bill was filed by appellant against the sheriff of Cook county, John Johnson, Jesse G. Wells and John Alquist, and the relief prayed was that the redemption money then in the hands of said sheriff might be treated as proceeds of the sale of said real estate, and declared a trust fund in the hands of said sheriff and subjected to the payment of the claim of appellant.

A temporary injunction was issued upon the filing of the bill, restraining the sheriff from paying over said money to John Johnson, and restraining said Johnson from assigning or otherwise disposing of the certificate of purchase issued to him by said sheriff, upon the making of the sale aforesaid. On May 3, 1897, upon argument of the general demurrers filed to the bill, the Circuit Court dissolved the temporary injunction and dismissed the bill.

It is contended that it appears from the averments of the bill and the necessary inferences therefrom, that the notes were obtained from the bank by John Johnson for the purpose of procuring a judgment, to be entered upon them in the name of Wells, against John Alquist alone, with fraudulent intent, and that this amounted to a payment of the notes by Johnson, one of the payors, and therefore an extinguishment of the notes resulted.

To this we cannot assent. It was the purpose of the bill to show that Johnson, one of the makers of the notes, had paid them, and that the liability of Alquist upon the notes had thereby been extinguished, it was a simple matter to have alleged such *fact* of payment. After demurrer had been argued and sus-

tained, appellant might still have taken leave to amend, and could then have alleged the fact which counsel now seek to have supplied by inference and argument. Argument and inference cannot thus take the place of necessary positive allegation.

But is is argued that the transactions through which Johnson acquired the right to the redemption money, being fraudulent, therefore equity will impress upon the fund, *i. e.,* the redemption money, a trust in favor of appellant as *cestui que trust.* We are unable to see the force of this contention. The premise upon which the argument rests is wholly wanting. The bill contains no allegation of fact which constitutes fraud. It is true that there is much statement of fraud as a conclusion of the pleader, but there is absence of any allegation of acts or facts to support such conclusion. Such statements of conclusion are of no avail. Roth v. Roth, 104 Ill. 46; East St. Louis Conn. Ry. Co. v. People, 119 Ill. 182.

The case of Darst v. Thomas, 87 Ill. 225, which is cited in support of the contention of appellant, is clearly distinguishable from the case here. If in this case the bill alleged that the debt secured by the notes in question was equitably the debt of Johnson and not equitably the debt of Alquist, then the contention of appellant might find support in the case cited. But the bill wholly fails in any such allegation. So far as the bill shows, the debt secured by the notes may have been, in equity, the debt of Alquist only. One seeking relief in equity must allege in distinct terms the facts necessary thereto.

The demurrer to the bill was properly sustained.

Decree affirmed.

JACKSON v. JACKSON,

114 Ill. 274.

(1893.)

Mr. Justice Craig delivered the opinion of the court.

It is first contended by appellee that there is no such error appearing on the face of the decree as will authorize a court of equity to interfere by bill of review. If there has been an erroneous application of the facts found by the decree, a court of equity may revise or reverse the decree by bill of review. Evans v. Clement, 14 Ill. 208. The facts upon which the court found that John Jackson was entitled to hold the premises as tenant by curtesy, all appear on the face of the decree.

The date of the purchase of the lands by Paulina A. Jackson, with their description, date of her marriage, date of the birth of her children, and date of her death, all appear on the face of the decree. If, therefore, the decree under the facts as found, was erroneous, it could be corrected. The next question presented is, whether the complainants or either of them have lost their right to bring this bill, by lapse of time. As has been seen, the decree was rendered on the sixth day of April, 1883, and this bill was brought on the twentieth day of August, 1890. No time has been prescribed by statute within which a bill of review must be brought, but writs of error are required to be sued out within five years from the time a judgment or decree has been rendered; and in analogy to the time prescribed for prosecuting writs of error, it has been held that a bill of this character should be brought within the time allowed for suing out a writ of error. Lyon v. Robbins, 46 Ill. 278. In case of writ of error, sec. 86, chap. 110, of our Practice Act, prescribes, that a writ of error shall not be brought after the expiration of five years from the rendition of the decree or judgment, but if the party entitled to the writ was an infant when the judgment was entered, the time of minority shall be excluded from the five years.

Applying this rule to the present case, which we think should be done, John M. Jackson, one of the complainants, as found by the court in this decree, was born August 25, 1866; he would not, therefore, be of age until August 25, 1887, and, excluding his minority, he would have until August 25, 1892, to bring his bill, and the bill was filed two years before the time expired. So far, therefore, as John M. Jackson is concerned, his bill was brought in apt time. As respects the other complainant, he occupies a different position; he, as appears, became of age in October, 1883, and hence would be barred in October, 1888. It is, however, said that the time did not begin to run until the suit was finally disposed of in March, 1889. We do not concur in that view. The rights of all the parties as to their title and interest in the premises were fully and definitely determined and settled by the decree of April 6, 1883. That was a final decree and as to all persons who were parties to the proceeding, and under no disability, the decree could not be reviewed by writ of error or bill of review after five years, and the fact that the cause remained on the docket until 1889, and was then stricken from the docket, does not materially affect the question. The decree of April 6, 1883, was the only one ever entered in the case and there was nothing to prevent a writ of error from being prosecuted to review the decree at any time after it was rendered, for the period of five years.

WATTS v. RICE,

192 Ill. 123.

(1901.)

Mr. Justice Carter delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Washington county upon a bill of review, filed to review and change a decree in a suit in partition. The decree in partition had determined the interests of

respective parties to the lands in question, and there had been a sale of the lands and a payment of the purchase money to the master, but no distribution of the proceeds had been made. The bill of review does not attack the sale, but seeks to change the decree fixing the interests of the parties, and also the basis of distribution.

The facts necessary to an understanding of the case are, that Jeremiah Rice died testate, as found by the decree in partition, in June, 1876, but as found by the decree upon the bill of review, in December, 1878. The bill and decree in partition alleged and found that he died, seized of the north half of the northeast quarter and the northeast quarter of the northwest quarter of section 10, and the south half of the southeast quarter (except ten acres described), and the southeast quarter of the southwest quarter of section 3—all in township 3, south, range 3, west of the third principal meridian; also that he left surviving him Mary H. Rice, his widow, and nine children and four grandchildren, one of which grandchildren was the child of a deceased daughter, and three the children of a deceased son. Before the proceedings in partition there had been sales and conveyances of the interests of many of the heirs, and the decree found and fixed the interest of (among others) James A. Watts, appellant herein, to be the undivided two-elevenths, and of Alexander Z. Rice, appellee herein, the undivided 136/308 of said lands. The original bill for partition was filed by said Alexander Z. Rice and James A. Watts. The bill of review was filed by said Alexander Z. Rice and other of the heirs, and alleged that Massey Rice was the first wife of Jeremiah Rice, and that she died in 1845, seized of the title to eighty acres of said land, viz., the northeast quarter of the northwest quarter of section 10 and the southeast quarter of the southwest quarter of section 3 and that, subject to his estate by the curtesy, it descended to her children, who were eight of the said eleven children of Jeremiah Rice, and that the other three were children of Mary H. Rice, his second wife, and were not entitled

to any part of said eighty acres, and that, therefore, the former decree was erroneous and should be corrected. It was alleged, also, that the complainants did not know of said facts at the time of the former proceedings and could not have ascertained the same by reasonable diligence. Certain of the parties also filed a bill of interpleader and a cross-bill setting up a mortgage given by certain heirs on their interest in the property to secure certain notes they had given. Issues were made, and on the hearing the court found that said notes and mortgage were barred by limitation, but granted the prayer of the bill of review and corrected the former decree, and ordered a distribution of the proceeds of the sale of said eighty acres among the heirs, or their grantees, of said Massey Rice, and not among all the heirs, and their grantees, of said Jeremiah Rice, as the former decree had adjudged.

It appeared from the evidence that the eighty acres constituted a part of the Jeremiah Rice farm and that he had had possession until his death and claimed to own it, and his title to it seems never to have been questioned till about the time the bill of review was filed; but it was proved by certified copies of United States patents that it was entered by Massey Rice and that the patents were issued to her of lands subject to sale at Kaskaskia, and said patents showed entries on their face as follows: One, "Recorded Illinois, vol. 133, page 316," and the other, "Recorded Ill. vol. 141, page 112." Complainants also gave in evidence a certificate of the Auditor of Public Accounts of this state that he was custodian of the records of the United States land office formerly located at Kaskaskia, and that such records show that one of said forty-acre tracts was entered by Massey Rice on September 15, 1836, and the other February 22, 1839. Alexander Z. Rice, complainant in the bill of review and also complainant in the bill for partition, testified that he first learned that the title to the eighty acres was in Massey Rice, a few months, only, before the bill of review was filed; that he learned it from the abstracter, who

asked him who Massey Rice was, and who told him "there was no connection with the title." Before that, and when he bought out the interests of some of the heirs, it had been considered that the interest of each of the eleven children of Jeremiah Rice in all the lands was one-eleventh. It is clear from the evidence that it was so understood by all the parties in interest until it was disclosed by the abstracter, in making an abstract, that the patent title to the eighty acres was never in Jeremiah Rice, but was in Massey Rice, his first wife; but there was no evidence whatever that the complainants in the bill of review, who were also parties to the partition suit,—one of them, Alexander Z. Rice, the principal owner, being complainant in that suit,—used any diligence whatever to ascertain the true state of the title to that land. Questions of estoppel and other defenses set up by the appellants have been urged in addition to complainants' lack of diligence, but as the latter is a sufficient defense we do not find it necessary to consider any other.

It must be presumed that parties interested in land and seeking its partition among them, will make, or cause to be made, an examination of the title, in order that the court may render a proper decree, and it is not sufficient to show, in support of their bill for a review of the proceedings and the correction of the decree because of newly discovered matter, that they were ignorant of the title. The bill properly alleged that they could not have discovered the new matter by reasonable diligence. This necessary allegation should have been supported by proof. If the facts were such that the allegation could not be proved because the title to the land was a matter of public record open to the inspection of every one, the rule would not be changed or rendered inapplicable, but only the fact made apparent that there was a failure to exercise reasonable diligence in the examination of the title. Such an examination prior to the partition proceedings would have disclosed the same title in Massey Rice now asserted in the bill of review. A bill of re-

view based on newly discovered evidence is designed to accomplish the same purpose as a petition for a rehearing in chancery or a motion for a new trial at law. Such a petition or motion must, however, be filed or made during the term, while a bill of review is filed only after the term at which the decree was entered. (*Elzas* v. *Elzas,* 183 Ill. 160.) But diligence must be shown in either case. Not only must the matter be new and sufficient to have produced a different decree from the one rendered, but it must be such that the party, by the use of reasonable diligence, could not have known of it before the hearing, so as to have produced it at that time. *Boyden* v. *Reed,* 55 Ill. 458; *Wasburn & Moen Manf. Co.* v. *Wire Fence Co.,* 119 id. 30; 3 Ency. of Pl. & Pr. 582.

It is also contended by appellants that the decree of partition was essentially a consent decree, and that a bill of review will not lie to correct or change a consent decree. (*Cox* v. *Lynn,* 138 Ill. 195; *Flagler* v. *Crow,* 40 id. 414.) The rule contended for is undoubtedly correct, but we need not consider whether the former decree can be said to have been entered by consent. True, the principal party in interest and one of the complainants in the bill of review was one of the two complainants in the partition suit, and asked the court in that case to make the decree which was made and which he now asks the court to change and correct. But it is sufficient to dispose of the bill, that the complainants failed to exercise such reasonable diligence as would have disclosed the true state of the title.

The court below properly decided that the notes and mortgage set up by the interpleader and cross-bill were barred. They had been due and nothing paid on them, nor any promise to pay, for upwards of eighteen years. But for the error pointed out the decree must be reversed and the cause remanded to the Circuit Court, with directions to dismiss the bill of review as well as the interpleader and cross-bill.

Reversed and remanded with directions.

McDONALD v. ASAY,

139 Ill. 123.

(1891.)

Mr. Justice Scholfield delivered the opinion of the court.

Decree was rendered in the Circuit Court of Cook county, on the twenty-first of December, 1886, in favor of Paris, Allen & Co., against Edward G. Asay, as assignee of Gage & Rice, for $2,850. Asay appealed from that decree to the Appellate Court for the First District, and M. C. McDonald became his surety upon his appeal bond. The decree of the Circuit Court was affirmed by the Appellate Court, and thereafter McDonald paid the amount of the decree to Paris, Allen & Co. After making such payment, McDonald caused an execution to be issued on the decree, and levied it upon lands situated in Ogle county, the title of record whereof was in Emma O. Asay and Margaret I. Asay, and he afterwards obtained leave to file what he termed a supplemental bill in the Circuit Court of Cook county, wherein he alleges that since the rendition of the decree in favor of Paris, Allen & Co., on the twenty-first of December, 1886, against Edward G. Asay, and after he (McDonald) had paid the amount thereof to the complainants in that suit he had learned that Edward G. Asay, on or about the sixteenth of May, 1885, purchased the lands in Ogle county upon which the execution was levied, but caused the same to be deeded to Emma O. Asay and Margaret I. Asay, instead of to himself, for the fraudulent purpose of hindering his creditors, and preventing Paris, Allen & Co. from obtaining satisfaction of any decree which might be rendered in their favor against him. McDonald further alleges in his bill that the title to the lands levied upon still stands in the names of Emma O. and Margaret I. Asay, and that Edward Asay resides thereon and assumes the management and control thereof; that a large portion of the money held by said Asay, as assignee of Gage & Rice, and due to the complainants

in the original bill, as found by decree therein, was used by Edward G. Asay in the purchase of said premises; and the levy of execution on said premises and filing certificate of same in Ogle county, and that Edward G. Asay has no personal property subject to levy and sale. Edward G. Asay, Emma O. Asay and Margaret I. Asay are made parties defendant. The prayer is that Edward G. Asay may set forth and state the circumstances attending the conveyance of said premises to said Emma O. Asay and Margaret I. Asay, how the payments were made and from whence the money was derived, and that he, McDonald, may have the same relief that original complainants could have. To this bill the defendants interposed the plea that they were all, at the time of filing the supplemental bill, residents of Ogle county, and that the bill does not affect the title to real estate in Cook county, where the bill was filed. McDonald refused to reply to the plea, and, upon hearing, the court dismissed the bill. The decree of the Circuit Court was affirmed on appeal to the Appellate Court for the First District.

The contention of appellant is, that this being a purely supplemental bill, it is sufficient that the Cook County Circuit Court had jurisdiction of the original bill. But the courts below held (and in that ruling we concur) that this is not a purely supplemental bill, but that it is an original bill in the nature of a supplemental bill. A supplemental bill is said to be properly applicable only to cases where the same parties in the same interests remain before the court. (Story's Eq. Pl., sec. 345.) But where relief of a different kind, or upon a different principle, is required from that in the original decree, an original bill in the nature of a supplemental bill may be filed. Story's Eq. Pl., sec. 351b.

No relief was sought in the original bill against Emma O. Asay and Margaret I. Asay, and they were not parties to that bill, and it is palpable that whether those individuals are entitled to hold the lands in controversy as against the creditors of Edward G. Asay, must depend upon entirely different evidence, and the

application of different legal principles from what is required under the original bill.

Under the facts presented by the plea, only an original bill in the nature of a supplemental bill could be filed, and that should have been in Ogle county, where the lands sought to be affected lie and all the defendants reside.

The judgment is affirmed.

Judgment affirmed.

ELZAS v. ELZAS,

183 Ill. 132.

(1899.)

Mr. Chief Justice Cartwright delivered the opinion of the court.

A decree was entered January 22, 1897, in the Circuit Court of Cook county, in favor of appellee, divorcing her from appellant on the ground of desertion. Appellant prayed an appeal from that decree, and also filed his petition for leave to file a bill of review on the ground of newly discovered evidence. He did nothing further with his petition but removed the record to the Appellate Court, where the decree was affirmed. He then took a further appeal to this court, and the judgment of the Appellate Court was affirmed by this court February 14, 1898. (*Elzas* v. *Elzas,* 171 Ill. 632.) After such final affirmation of the decree he filed in the Circuit Court, February 21, 1898, a supplement to his petition and asked the court to set aside the decree. The Circuit Court denied his petition, and he prosecuted an appeal from that order to the Appellate Court, where it was affirmed, and he now brings the case made by the petition to this court by a further appeal from the Appellate Court.

Leave to file a bill of review for newly discovered evidence is not granted as a matter of right, but granting or refusing such leave rests in the sound discretion of the court to which the application is made. The newly discovered evidence upon which the court

is asked to review, and reverse the former decree must not be cumulative, and must be of important and decisive character, if not, conclusive. It must be such as would apparently have produced a different result had it been known and brought before the court. (*Griggs* v. *Gear,* 3 Gilm. 2; *Walker* v. *Douglas,* 89 Ill. 425.) The petition will not be granted except upon affidavit satisfying the court that the alleged new matter was not known to the petitioner, and could not have been discovered and produced or used by him by the exercise of reasonable diligence, before the entry of the decree sought to be reviewed. The newly discovered evidence must be distinctly stated and the affidavits of witnesses must be filed in support of the averment. (*Schaefer* v. *Wunderele,* 154 Ill. 577.) If the petitioner has been negligent in discovering and producing the evidence at the former hearing his negligence will bar any relief. He must show that the evidence was such that with the use of reasonable diligence he could not have known of it before the hearing, and the general rule is, that evidence which tends simply to impeach testimony given on the hearing will not be sufficient to sustain a bill of review. (*Boyden* v. *Reed,* 55 Ill. 458.) When the petition is presented the court considers its statements and the affidavits in support of it, and the record in the original case. The court then, upon looking at the whole case, exercises a sound judicial discretion, and unless such discretion has been abused the decision will not be disturbed. "The true rule would seem to be, that unless there has been an abuse of the fair discretionary power with which the Circuit Court has been invested in the matter of such applications its decision should not be disturbed." *Schaefer* v. *Wunderle, supra; Stockley* v. *Stockley,* 93 Mich. 307.

Petitioner met the charge of desertion contained in the original bill with a denial of his marriage to the complainant, and that was the controverted fact in the case. There is no new evidence offered on that subject. There is an affidavit of William T. Hall, a justice of the peace of Cook county, that complainant testified

in a suit before him that she was the wife of petitioner and was married by a marriage ceremony. She was examined on that subject at the hearing and did not deny that she had so testified, and her counsel admitted it. The justice of the peace lived in Chicago, where the hearing took place, and had agreed to come on a telephone message, but the fact that complainant had testified as claimed having been admitted, petitioner's solicitor did not think it worth while to telephone. The birth of a child of the parties at Toronto was alleged in the bill and there was testimony of the fact. One of the grounds of the petition is the alleged newly discovered evidence that the child was born in June instead of July, 1886, and was registered under the name of Taylor. The supposed evidence does not comply with the above rule requiring an affidavit, but consists merely of a telegram signed W. Stark and directed to W. A. Pinkerton, and, aside from its not being an affidavit, it is totally insufficient as a statement of any fact. If there was a registry of births in Toronto, petitioner does not show the slightest cause for not ascertaining what it was and bringing it before the court in a proper form. On the hearing, complainant testified that petitioner gave her his photograph, and the petition alleges that the photograph was made at a later date and that it was taken from petitioner's trunk at a hotel in Chicago. He testified in the same way at the hearing, and the evidence was merely cumulative and neither important or decisive in character. Again, there is an affidavit of Joseph F. Ullman that complainant was not introduced to him and his wife as petitioner's wife, as complainant testified on the hearing. That evidence is cumulative, and it is not denied that Ullman wrote a letter to complainant, which was in evidence on the hearing, addressing her as petitioner's wife and enclosing money at the request of petitioner. The evidence, if produced, would be of little consequence in view of such fact.

The remaining ground upon which petitioner asked the court to review and reverse the decree was that

complainant had been guilty of adultery during the marriage. That defense to the bill was not set up by the petitioner nor made an issue in the case in any manner, and the rule is that the newly discovered evidence must be such as relates to a matter in issue on the hearing—not evidence to make a new case, but to establish the old one. (*Boyden* v. *Reed, supra.*) Aside from that rule, the petition fails to comply with the requirement of showing that petitioner could not have discovered the testimony, by the use of reasonable diligence, in time for the hearing. The bill was filed September 11, 1896,—more than four months before the hearing. He was served with process and appeared and filed his answer. He had ample time to hunt up any defense that he might have had. He was not hindered in any manner from making any investigation of the life or associations of his wife that he saw fit. The source of the alleged new evidence is two abandoned women with whom the petitioner was well acquainted. One of them was the woman whose house he had frequented, where the complainant lived before the marriage. The other one had entrusted her two children to the complainant about two years before the hearing, and she had boarded and cared for them one year and the witness had frequently visited them. These women lived in Chicago and were known to the petitioner, and were persons of whom he would naturally make inquiries touching his alleged defense. The avenues of information were open to him as fully during the four months before the trial as afterward. He says in his petition that he was surprised at the testimony of a common law marriage at the hearing, but, if so, no application for a continuance was made. No excuse whatever is offered for having hunted up this alleged defense after the hearing instead of before, nor any explanation given that would excuse him.

The petition does not show any sufficient reason for granting leave to file a bill of review or for opening the decree. This is the necessary conclusion from the petition and the affidavits filed in support of it, in

connection with the record in the original case, without considering the affidavits contradicting the newly discovered evidence. Whether the filing of such affidavits was proper we need not consider.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

McCLINTOCK v. HELBERG,

168 Ill. 324.

(1897.)

Mr. Justice Magruder delivered the opinion of the court.

This court has decided that appellee was entitled to the relief prayed for in the original bill, that is to say, that he was entitled to have paid to him by appellant the $750.00 of purchase money, and to have transferred to him said note for $3,690.00 and the trust deed securing the same. The question then arises, whether the facts set up in the supplemental answer constitute a defense against the granting of the relief prayed for in the bill. Appellant contends, that appellee released his right to the $750.00 and to the note for $3,690.00 by accepting the bond for $4,500.00 Appellee claims that the bond never was accepted as a release or discharge of appellant from his liability to pay the $750.00 and the note of $3,690.00 to appellee. Upon this question of fact there is a sharp conflict in the testimony. The testimony of appellee tends to show, that the consideration, for which the bond was given, was merely that appellee should take no steps to apply to the Appellate Court for a continuance of the injunction; and that neither appellee, nor his solicitor, ever intended to release appellant from his obligation to pay the note and money to appellee, or ever intended that the note should be paid to the defendant, Hartman. Upon this question of fact the lower courts have decided in favor of appellee. After a careful examination of the evidence we are unable to say that finding of the lower

courts is against the weight of evidence, and therefore decline to disturb it.

The bond was never delivered to the appellee. It was executed and handed to appellee's solicitor before appellee knew anything about it. It was some time after the delivery of the bond to his solicitor before appelle knew that any such bond had been executed or delivered to his solicitor. None of the transactions in reference to the bond took place between any of the defendants and appellee, but only between the defendant, Hartman, or his solicitor, and appellee's solicitor. Appellee's solicitor told him a few days after the execution of the bond, that such a bond had been executed, but, in connection with this statement, he told appellee that it was not necessary to continue the injunction in the Appellate Court, as the note was overdue, and the pendency of the suit was a sufficient protection. He told appellee, that the solicitor on the other side had left the bond with him, and that he did not know whether it was of any account or not, but that he considered it an additional security; and that appellee had lost nothing by its delivery, but had gained a point. Appellee's solicitor swears, that he did not tell Helberg that appellant was released by the taking of the bond, or that anybody was released or discharged thereby. It is furthermore established by the testimony, that, before Mrs. Hartman began suit against appellant upon the note, appellant caused application to be made to appellee to release some of the property covered by the trust deed and appellee declined to do so.

There is no evidence whatever in the record, that appellee ever authorized his solicitor to accept this bond as a substitute for the liability of appellant to pay the $750.00 to appellee, and to pay to appellee the amount due on the note for $3,690.00. Furthermore, there is no evidence in the record, which at all establishes the fact, that appellee ratified, or in any way approved, of the taking of said bond as a substitute for such liability, and as a release of appellant,

even if his solicitor had agreed to take it as such substitute or as such release.

An attorney has no authority, by reason of his general retainer in a suit, to discharge a debtor to his client, or to accept anything other than money in payment of his client's debt. He must have special authority from his client to settle a debt due to the client otherwise than by the payment of money. (*Trumbull* v. *Nicholson,* 27 Ill. 149; *Nolan* v. *Jackson,* 16 id. 272; *Wetherbee* v. *Fitch,* 117 id. 67.) An attorney has no power, without express authority, to bind his client by a compromise of a pending suit, or other matter, intrusted to his care. An executory agreement to compromise a suit, made by an attorney, does not bind the client, unless the latter ratifies such agreement after full knowledge of all the facts. The attorney has no implied authority to compromise his client's claim or to release his client's cause of action. He cannot bind his client by any act, which amounts to a surrender, in whole or in part, of any substantial right. He cannot commute a debt, or materially change the security, which his client may have, without his consent; nor has he the power to assign or sell a claim or judgment of his client without special authority. (3 Am. & Eng. Ency. of Law, 2nd ed. pp. 358-360, 363; Mechem on Agency, sec. 813; 2 Greenleaf on Evidence, sec. 141; *Penniman* v. *Patchin,* 5 Vt. 346; *Benedict v. Smith,* 10 Paige, 126; *Smock* v. *Dale,* 5 Rand. 639; *Wilson* v. *Wadleigh,* 36 Me. 496; *Chapman* v. *Cowles,* 41 Ala. 103; *Wadhams* v. *Gay,* 73 Ill. 415). Where an attorney, in making an agreement with the opposite party, compromises a claim for less than the amount due, or takes security of less value than that which already secures the claim, or accepts anything other than money in payment of the claim, such party is put upon inquiry as to the attorney's authority to make such compromise or settlement; and if he omits to make inquiry, or to demand the production of the authority, he deals with the attorney at his peril. (*Brooks* v. *Kearns,* 86 Ill. 547; *Miller* v. *Lane,* 13 Ill. App. 648; Weeks on Attorneys, sec. 240;

Wharton on Agency, secs. 580-583; Campbell's Appeal, 29 Pa. St. 401.)

In the case at bar, appellant charges, that appellee's solicitor surrendered a claim for $750.00 against appellant who was a responsible party, and a note for $3,690.00 secured by a trust deed upon land which was worth much more than the amount of the note in exchange for a bond which was, to say the least, of very doubtful value. The transactions in regard to the bond were made out of court and were not a part of the record in the pending suit. Appellant was bound to know, that appellee's solicitor had no right to make any such surrender without special authority from appellee. Appellant should, therefore, have inquired as to the authority of the solicitor to make the arrangement; and, after it was made, it was his duty to inquire whether or not it had been ratified and accepted by appellee. When he applied to appellee for a release of the property covered by the trust deed and was met with a refusal, he was put upon his guard and was virtually informed that appellee had not accepted the bond as a release of his liability. In addition to this, it is in proof, that, when appellant was sued upon the note by Mrs. Hartman, appellee's solicitor advised him to defend against the suit, upon the ground that, if he paid the note to Mrs. Hartman, he might be obliged to pay it again to appellee.

Moreover, if appellee's solicitor surrendered this note and trust deed in exchange for this bond, the former was a security so much more valuable than the latter, as to render such solicitor liable to the charge of bad faith. It is a well-settled rule, that agreements by an attorney which are so unreasonable as to imply bad faith, will operate as notice of such bad faith to the opposite side, and will have no binding effect upon the client. (*Ball* v. *Leonard*, 24 Ill. 146; Weeks on Attorneys, sec. 220).

It is not altogether clear that the note sued upon by Mrs. Hartman was actually paid by appellant. The suit brought upon the note could have been defended by appellant. The note was never in the possession

of Mrs. Hartman, and the suit, though brought in the name of Mrs. Hartman, was really a suit by Hartman himself. Appellant was advised by his own attorney, that he had a good defense to the suit. It appears that appellant had some claims against Hartman growing out of old transactions. Hartman had sold some property for him, and failed to pay over some of the money due on account of such sale. The larger part of the payments made upon the note consisted of an application upon the note of these old claims against Hartman. There was thus an inducement on the part of appellant to regard Hartman as the owner of the note, in order that, by such application, he could secure payment of these other claims. Certainly he well knew that the note and trust deed were claimed, on the one side by appellee, and on the other by Hartman. He owed the debt due upon the note, and has never been disposed, so far as we can discover, to deny his obligation to pay the note to somebody. When, therefore, appellee was seeking to recover the note by the chancery suit, and Mrs. Hartman was seeking to recover the amount due upon the note by a suit at law, he should have filed a bill of interpleader instead of paying the note to Mrs. Hartman. He would thereby have protected himself. He had a right to file a bill of interpleader under the circumstances stated. (*Ryan* v. *Lamson*, 153 Ill. 520; *National Live Stock Bank* v. *Platte Valley State Bank*, 54 Ill. App. 483; *Curtis* v. *Williams*, 35 id. 518; *Livingstone* v. *Bank of Montreal*, 50 id. 562.)

When appellant paid the note to Mrs. Hartman, if he paid it, the present suit was pending, and he and Hartman and Kuhns and Kintz and all the agents were parties to that suit. He thus had full notice of the claim of appellee, and was aware of the fact that appellee was prosecuting the suit in the Appellate Court and in this court.

It is undoubtedly a hardship upon appellant to pay the $750.00 and the note to appellee, if he has already paid them to Hartman or his wife, but, in view of the circumstances already stated, and for the reasons

already given, he has no equity in the matter which is superior to the equity of appellee.

Accordingly the judgment of the Appellate Court is affirmed.

Judgment affirmed.

LLOYD v. KIRKWOOD,

112 Ill. 329.

(1884.)

Mr. Justice Mulkey delivered the opinion of the court.

The United States on the first day of May, 1849, issued a patent to Thomas A. Speers for the southeast quarter of the northwest quarter of section 17, town 37, north, range 15, east, in Cook county, this state. Speers died intestate, in 1855, leaving Josephine Speers, an only child and heir, who afterwards intermarried with Sidney P. Walker. Josephine Speers Walker died in November, 1864, leaving Sidney P. Walker, her husband, and Mary Louise Walker, her only child and heir at law, the latter being then an infant, about ten months old. On the thirty-first of January, 1874, Samuel Ray filed in the Circuit Court of Cook county a bill in chancery, against the said Mary Louise Walker, to establish an alleged resulting trust to an undivided two-thirds of the land, and to compel a conveyance of the legal title thereto, she being then about ten years of age. The bill set forth, in substance, that although the purchase of the land from the United States was in the name of Speers, alone, yet, as a matter of fact, it was made by the said Samuel Ray, Martin G. Taylor and the said Thomas A. Speers, who, respectively, advanced one-third of the money paid to the government therefor, and that as to the two-thirds of the land thus purchased by Ray and Taylor, Speers was a mere trustee. The bill further showed that Ray, about the first of May, 1850, purchased of Taylor his third interest in the property paying him for it at the time, and that in pursuance

of such purchase Taylor conveyed the same to him, by quitclaim deed, on the twenty-third of June, 1873, The bill prayed that Ray might be decreed to be the equitable owner of said two-thirds of the land, and that a commissioner be appointed, with directions to convey to him the legal title thereto. A decree in conformity with the prayer of the bill was entered on the twenty-first of July 1877, in pursuance of which Walter Butler, as special commissioner, by deed dated March 5, 1878, conveyed to said Ray an undivided two-thirds of said land. Ray died January 23, 1880, leaving a will, by which he gave to his widow, Esther Ray one-third, and the residue to Sarah J. Mann, Harriet E. Smith and Josephine Kleinman. Alice R. Kirkwood, subsequently, through *mesne* conveyances, acquired the interest of Esther Ray by purchase, paying a valuable consideration therefor.

Such being the condition of the property with respect to its ownership, Alice R. Kirkwood and Sarah J. Mann, with their respective husbands, Edwin C. Kirkwood and Bill Mann, on the thirtieth of March, 1882, filed in the Circuit Court of Cook county a bill for the partition of said land, making Mary Louise and Sidney P. Walker, and Harriet E. Smith and Josephine Kleinman, and their respective husbands, defendants to the bill. There were other defendants to bill, whose interests are collateral to the main questions involved in the case, and therefore require no special notice. The bill thus filed set up the former decree and proceedings thereunder, and charged, in detail, the facts above stated. Mary Louise Walker appeared and answered the bill, and also filed a cross-bill, in which she charges, in substance, that the land in controversy was purchased and paid for exclusively by her grandfather, Thomas A. Speers, and that neither Tayor nor Ray now has, or ever had, any interest in the land or any connection with its purchase, and that she is now the sole and exclusive owner thereof, as the heir of her deceased mother. In short, by her said cross-bill she negatives all the material allegations in the bill filed by Ray against her, as above

set forth, and in addition thereto charges, in substance, that at the time of the alleged proceeding she was but a little child, only ten years of age, and unable to comprehend the nature of it, but that the files of the suit show that one Joseph L. Wilson, a deputy clerk of the court, appointed on the suggestion of complainant's solicitor, appeared for her as guardian *ad litem,* and as such filed an answer on her behalf, prepared by complainant's said solicitor; that Sidney P. Walker also filed an answer in his own right, and as guardian of his daughter, the said Mary Louise, setting up their respective interests in the land, and disclaiming all knowledge of the alleged equities of the complainant in that bill. To this answer there was a replication, but none to the answer of Wilson, as guardian *ad litem.*

After setting out the decree in that suit to the effect heretofore stated, and certain irregularities in taking and certifying certain depositions, the cross-bill then proceeds to charge as follows: "It appears by said record that said Samuel Ray was of sufficient capacity to maintain his suit in 1849 and 1850; that he then knew of all claims and causes of action or suit set out or claimed in said bill by him exhibited in 1874; that no reason existed why he should not have brought such suit at any time after the said pretended claims arose, if any such claims or rights ever existed, and the failure to bring such suit, or to demand the declaration of such trust and confidence, as is alleged in said bill for the period of twenty-five years, is conclusive evidence that no such claims, trusts or confidences ever existed, and the *laches* and delay in bringing suit on said pretended claim barred all suit thereon, and would have barred the best and most perfect claim, rendering it the duty of the court to dismiss the bill." The cross-bill then charges, in substance, that complainant's interests were not protected in said former suit; "that said Wilson (the guardian *ad litem*) took no part in taking any evidence, or in any proceeding or in the hearing of said cause, nor did any person in any manner act for him;

* * * that no evidence was given or received in said cause that was admissible against your oratrix." It further appears, from the cross-bill, that Ray himself was examined orally in court against her, and that certain depositions were read against her on the hearing, which are claimed to be obnoxious to various objections, particularly specified, requiring their suppression, about which, in the view we take of the case, it is not necessary to express any opinion.

To the cross-bill thus framed the court sustained a demurrer, and entered an order dismissing the same. On the day previous to the entry of this order, to wit, the twenty-fourth of January, 1884, the death of Sidney P. Walker was suggested, he having died pending the suit. The cause proceeded to a hearing on the original bill, and a final decree was entered therein on March 1 following, directing a partition of the premises in conformity with the prayer of the bill, from which decree complainant in the cross-bill prayed an appeal to this court. On the fourteenth of the month her intermarriage with L. H. Lloyd, was suggested of record, who joins her in this appeal.

Assuming appellant is entitled to relief against the decree of 1874, by a bill of review, or by an original bill in the nature of a bill of review, we perceive no force in the claim that the cross-bill in this case is not germane to the original bill, and that for that reason it was properly dismissed. If, as a matter of law, she was entitled to have the decree upon which appellees base their right to petition to set aside and annulled, on a bill filed by her for that purpose, most assuredly such right in her is appropriate matter for a cross-bill to an original bill filed by them for the express purpose of enforcing such partition.

The question is then presented, whether the decree of 1874 can be successfully assailed by a bill of either character indicated. The authorities are universally agreed that a decree against an infant may be so attacked for fraud, and this is conceded by appellees; but they are not so agreed where the decree or judgment is assailed for error merely. Upon this proposi-

tion there is considerable diversity of opinion. By the law as it is judicially declared in England and in many of the states here, a decree against an infant is not absolute in the first instance. It is binding *sub modo* only. On becoming of age he is entitled to his day in court to show cause against the decree, and his right to do so must be expressly reserved by the decree itself, otherwise it will be erroneous, and subject to be reversed and set aside. In many of the states, however, including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error, merely; but until so attacked, and set aside or reversed, on error or appeal, it is binding to the same extent as any other decree or judgment. This right to attack a decree by original bill may be exercised at any time before the infant attains his majority, or at any time afterwards within the period in which he may, under the statute, prosecute a writ of error for the reversal of such decree. (*Kuchenbeiser et al.* v. *Beckert,* 41 Ill. 172.) In this case, which was a bill to impeach and set aside a decree against an infant, the rule as above stated is expressly laid down, and has been followed in subsequent cases. The rule thus established is, of course, subject to the qualification that the decree of a court having jurisdiction of the subject-matter of the suit and the person of the infant against whom it is rendered, will not be thus set aside as against third parties who have in good faith acquired rights under it; but as against original parties to the suit, and their legal representatives, the rule as above stated will be enforced. Freeman on Judgments, sec. 513.

In *Lloyd et al.* v. *Malone et al.,* 23 Ill. 43, this court, after citing *Richmond et ux.* v. *Tayleur,* 1 P. Wms. 734, and other English cases, together with the rules as laid down in Mitford's Chancery Pleadings, sec. 113, in support of the position that an original bill will lie to impeach a decree against an infant for mere error, and after citing certain cases in New York, Kentucky and Ohio, where the right to file such bill is limited

to cases of fraud, proceeds to say: "We are inclined to go to the extent of the rulings of the English courts, and not confine the right to cases where fraud has intervened to obtain a decree against infants. * * * The interests of infants are the peculiar care of courts, and if their ights have been outraged and disregarded by an unfaithful guardian, the courts should not be slow to apply a remedy."

The rule here adopted upon a deliberate consideration of the authorities on both sides of the question, has been frequently recognized by this court, and whatever the rule may be elsewhere, it must be regarded as settled in this state. (*Kuchenbeiser et al.* v. *Beckert, supra.*) Whenever the property rights of an infant are drawn into litigation, and the infant himself, whether as plaintiff or defendant, has been brought into court, he at once becomes the ward of the court, and as such it is the duty of the court to see that his rights, as such are properly protected. If, having a legally appointed guardian, such guardian does not appear to the action for the purpose of managing his suit, it is the duty of the court to appoint a guardian *ad litem* to perform that duty. If the guardian who undertakes the performance of this trust, whether he be the general guardian, or merely a guardian *ad litem* fails to properly protect the interests of the ward, it is the duty of the court, *sua sponte,* to compel him to do so whenever the fact in any manner is brought to the notice of the court. If, for instance, the infant is defending and his guardian has failed to file some pleading essential to the admission of his defense, or has filed one so imperfect as not to be sufficient for that purpose, it is the duty of the court, whenever the fact is disclosed, to see that the proper pleading is filed on behalf of the infant before proceeding. These general propositions are so well settled and understood that they will hardly be controverted. Looking at the record before us in the light of these well recognized principles, and the authorities heretofore cited, we think there can be but little, if any, doubt that the cross-bill

showed such a state of facts as entitled the complainant to relief.

Passing over all other matters set up in the cross-bill, without expressing any opinion upon them the one way or the other, and coming at once to the question of delay in filing the bill of 1874 to establish and enforce the alleged trust, we have no hesitancy in holding that under the circumstances, as shown by the record, a delay of some twenty-five years, as was the case there before attempting to enforce the trust, afforded a complete defense to the bill, and this fact being apparent upon the face of the bill, the court should not have permitted the decree to have passed as against an infant. The land in question, during these twenty-five years, was in the actual possession of no one. The legal title, and, so far as the record showed, the equitable title also, was, during this entire period, in the appellant's grandfather or his lineal descendants, and he and they, for the same period, were in the constructive possession of the premises. No reason is assigned why this suit was not brought in Speers' lifetime, nor do we, from the record, perceive any. The parties in interest not only waited until his mouth was forever closed by death, so that it was impossible for him to give his version of the transaction, but waited until the mother of appellant had also died who may possibly have known of the purchase, and might have testified with respect to it had the suit been brought even in her lifetime and while the title was in her; but the suit was deferred until she died, also, thus making two descents cast, and a lapse of twenty-five years from the time it might have been brought till the day it was actually commenced.

To the suggestion that there was no adverse holding on the part of appellant or her ancestors, we do not think, under the circumstances of the case, there is much force in it. If one having a claim of this kind to vacant and unoccupied land, resting solely upon the mere memory of witnesses, unaided by any documentary proof, as was the case here, may lie by for some twenty-five years, and until all the parties on

one side of the alleged transaction are dead, and then maintain a bill of this kind against an infant representative of such deceased parties, it may be safely said that no owner of land so long vacant as this was, is safe.

To the further suggestion that this defense should have been set up by answer, it is sufficient to repeat what has already been said, that the delay in suing was a fact apparent upon the face of the bill; and conceding it should have been set up by way of answer, it was the duty of the court to have required such an answer to be put in, and the failure to do so would have been error. But we hold the rule suggested can have no application to an infant who is the ward of the court, as appellant was. In connection with this case we refer to *Walker* v. *Ray,* 111 Ill. 315, decided upon substantially the same state of facts.

The decree of the court below, for the error indicated, will have to be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Decree reversed.

SHIELDS v. BUSH,

189 Ill. 534.

(1901.)

Mr. Justice Magruder delivered the opinion of the court.

Third—It is claimed that the decree in this case is erroneous upon the alleged ground, that it grants affirmative relief to the defendants upon their answers, and without the filing of a cross-bill. The contention of the appellant is, that the Circuit Court should have rendered a decree, dismissing the appellant's bill so far as the eighty acres of land were concerned, and that the court, by failing so to dismiss the bill and by rendering a decree holding the title to the eighty acres to be vested in appellant and appellees as heirs of Catherine Shields, deceased, subject to a

life estate therein of the appellant, granted affirmative relief upon a simple answer. We do not think that the decree is erroneous in this regard. The doctrine is fully recognized, that the defendants in a bill should not be granted affirmative relief upon their answer. (White v. White, 103 Ill. 438; Mason v. McGirr, 28 id. 322). It is also true that, in a bill to remove a cloud from the title, a re-conveyance from the defendant to the complainant should not be decreed. (Pratt v. Kendig, 128 Ill. 293; Rucker v. Dooley, 49 id. 377).

But it is well settled that, where a bill in chancery contains a general prayer for relief, it must be regarded as sufficient to support any decree warranted by the facts alleged in the bill. (Gunnell v. Cockerill, *supra;* Stanley v. Valentine, 79 Ill. 544; Davidson v. Burke, 143 id. 139; Walker v. Converse, 148 id. 622; Gibbs v. Davis, 168 id. 205). In the case of Gibbs v. Davis, *supra,* we said: "The rule is, where a bill contains a prayer for special relief and also a prayer for general relief, the complainant may be denied a decree for the relief specially prayed for, and, under the general prayer, be granted such relief as he may be found entitled to have under the allegations of fact made in the bill, and the proof in support thereof."

In the case at bar, the prayer of the bill is that the deed in question "may be declared null and void as against your complainant, and all persons who may hereafter claim by or through him, as a cloud upon your complainant's title, and that the said deed may be delivered up and canceled; and that your complainant may have such other and further relief, as equity may require, and to your honor may seem meet." The amended bill alleges, that Catherine Shields left surviving her her husband, James Shields, and her father and brothers and sisters, "being the only heirs-at-law of Catherine Shields." It also alleges, that appellant and his wife occupied the lot, and the strip connected therewith, as their homestead at the time of the execution of the deed, and "that he and his wife continued to live thereon, and that his

wife did not join in the execution of the said deed, and that it was void and conveyed no title." It is also alleged in the bill, "that no complete legal title was conveyed to the said Catherine Shields;" and "that the said deed is without any legal effect whatever, though the same may not appear on the face of said deed." The bill also prays "that the said deed be set aside as a cloud upon your complainant's title, and your complainant prays the court that the said deed be revoked and declared null and void, and that the same be delivered up and canceled." The bill was also amended by inserting the allegation "that, if the court refuses the relief above asked, this complainant prays that the court construe the said deed, and determine whether any title of estate passed by said deed. Complainant further prays that, if the court refuse the relief above asked, the court set aside the said deed 'as to the homestead,'" etc.

Under the prayer of the bill and the allegations made therein as above referred to, the decree was not too broad. It merely construed the deed, and determined what title passed thereby in accordance with the prayer of the bill. Having found that the deed was void as a conveyance of the homestead, it proceeded to determine the title as to the farm of eighty acres. As the court could not, under the facts, grant the special prayer for the cancellation of the deed as a conveyance of the whole of the property, it could only grant the general relief of finding and decreeing the deed void as to the homestead, and of finding and decreeing the deed valid as to the eighty acres. The relief decreed was not upon the answer, but was under the prayer of the bill. The title to the eighty acres was not vested in the appellant and the heirs of his deceased wife by the decree, but it had already been so vested by the deed, and by the law, as applied to the construction of the deed. A court of equity could not, in the performance of its legitimate functions, decree otherwise than it did on the facts of this case.

Accordingly the decree of the Circuit Court is affirmed.

Decree affirmed.

* * * * * * * *

On the above facts the question arises as to whether Monroe and Lee must be held to an accounting to the firm of Monroe, Strang, Lee & Co. for the profits on the 70-mile contract, taken in their own names. A preliminary question is whether Strang and Williamson are barred by laches from maintaining their suit as to the 70-mile contract. In stating the principles of law applicable on these points, it is not considered necessary, even if time and other pressing duties admitted, to go into an analysis of the cases cited in the elaborate briefs of counsel. Indeed, it is well-nigh impracticable, and, if done, altogether unprofitable.

It was insisted that the court was without jurisdiction as to the 70-mile contract because the law afforded an adequate remedy. If this were true (which is not the case), the necessity for a bill in equity to settle the partnership as to the 50-mile contract, and the other expenses of the firm, was made necessary by reason of the action of Creech, acting in concert, and in the interest of Monroe and Lee, in refusing to deposit the money of the firm in the Merchant's Bank, according to the contract; and the court, having jurisdiction of the case and the parties for the purpose of settling the partnership for the 50-mile contract, will retain it for the purpose of administering complete relief between all the parties. Hopkins v. Grimshaw, 165 U. S. 358, 17 Sup. Ct. 401, 41 L. Ed. 739. Moreover, it is the settled law, in the federal courts, that where it is competent for a court to grant the relief sought, and it has jurisdiction of the subject-matter, the objection that there is an adequate remedy at law should be taken at the earliest opportuntiy, and before defendants enter upon a full defense. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Kilbourn v. Sunderland, 130 U. S. 514, 9 Sup. Ct. 594, 32 L. Ed.

1005. The jurisdiction of the court in this case is believed to be beyond dispute.

The rule governing laches in the institution of bills in equity for fraud is admirably stated and abundantly supported by authority in Kelley v. Boettcher (decided by the Eighth Circuit Court of Appeals) 29 C. C. A. 14, 85 Fed. 55. Judge Sanborn, delivering the opinion of the court, said:

"In the application of the doctrine of laches, the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. Rugan v. Sabin, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420; Billings v. Smelting Co., 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 263, 51 Fed. 338, 349; Bogan v. Mortgage Co., 27 U. S. App. 346, 357, 11 C. C. A. 128, 135, 63 Fed. 192, 199; Kinne v. Webb, 12 U. S. App. 137, 148, 4 C. C. A. 170, 177, 54 Fed. 34, 40; Scheftel v. Hays, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; Wagner v. Baird, 7 How. 234, 258, 12 L. Ed. 681; Godden v. Kimmell, 99 U. S. 301, 310, 25 L. Ed. 431; Wood v. Carpenter, 101 U. S. 135, 139, 25 L. Ed. 807. The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. The practical result is that a suit in equity for relief on the ground of fraud would not be barred by laches in the state of Colorado in less than three years after the discovery of the fraud, unless unusual circumstances made it inequitable to allow its prosecution. Some of the circumstances which will induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute are the destruction of the muniments of title, the death or removal of parties, the number of innocent purchasers who may be affected, radical changes

in the conditions and value of the property, and its speculative character. Lemoine v. Dunklin Co., 10 U. S. App. 227, 239, 2 C. C. A. 343, 348, 51 Fed. 487, 492. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case. The cases of Wagner v. Baird, 7 How. 234, 12 L. Ed. 681; Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Wood v. Carpenter, 101 U. S. 135, 139, 25 L. Ed. 807; and Rugan v. Sabin, 10 U. S. App. 519, 534, 3 C. C. A. 578, 582, 53 Fed. 415, 420,—belong to the class of cases in which the doctrine of laches was applied after the statute of limitations had run. The cases of Billings v. Smelting Co., 10 U. S. App. 1, 62, 2 C. C. A. 252, 262, 363, 51 Fed. 338, 349, and Bogan v. Mortgage Co., 27 U. S. App. 347, 357, 11 C. C. A. 128, 135, 63 Fed. 192, belong to the class of cases in which the court refused to apply the doctrine of laches within the time fixed by the statute. In the latter case this court declared that this doctrine was applied by analogy to the statute of limitations, to promote, not to defeat, justice, and refused to invoke it after a delay of 30 months. It is a familiar maxim of the courts of chancery, long since embodied in our statutes, that no time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it. Scheftel v. Hays, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; Alden v. Gregory, 2 Eden, 285; Prevost v. Gratz, 6 Wheat. 481, 5 L. Ed. 311; Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076; Badger v. Badger, 2 Wall. 87, 92, 17 L. Ed. 836."

This suit is not barred by any statute of limitations applicable to such cases in Arkansas. Wilson v. Anthony, 19 Ark. 16; Taylor v. Adams, 14 Ark. 62; Sullivan v. Railroad Co., 94 U. S. 811, 812, 24 L. Ed. 324. Nor is there anything shown to take the case out of the rule laid down in the case of Kelley v. Boettcher, supra, to the effect "that under ordinary circum-

stances a suit in equity will not be stayed for laches before the statute of limitations runs," and imposing upon the defendants, where the statute has not run, the burden of showing such unusual conditions or extraordinary circumstances as make it inequitable to allow the suit to be prosecuted, or to justify the application of the doctrine of laches.

A number of cases—chiefly mining cases (a class of property subject to great fluctuations of value)—have been cited by defendants to support the doctrine for which they contend, and in some of them the doctrine of laches has been applied after a briefer time has elapsed than in this case, but it is not believed they are applicable to the case at bar. In fact, Kelley v. Boettcher, supra, is itself a mining case. In this case there has been no destruction of evidence, except defendant Lee's letter book, which was destroyed by himself, if at all; no death or removal of parties; no innocent parties to suffer; no death or removal of witnesses; and no such lapse of time as that witnesses would be likely to forget important facts; no property to fluctuate in value; no loss; nothing, except the fact that Monroe and Lee assumed the risk and burden of the work over the protest of Williamson and Strang. Moreover, laches should never be applied to defeat justice, nor should it be applied when it appears, as in this case, that, while plaintiffs felt they had been wronged, yet were without evidence to show it, and when the evidence now shows that no amount of inquiry made of persons likely to know the facts, at the time the plaintiffs first learned that they were excluded from the 70-mile contract, would, with any reasonable degree of certainty, or even probability, have unlocked the salient facts and writings by which the positive denials of both defendants are now overturned; for, even on the witness stand, those who knew the facts denied them, and the truth was disclosed over their most persistent and earnest efforts to conceal it. The doctrine of laches ought not to be applied under the circumstances of this case, and especially since the institution of a suit at the time the

70-mile contract was executed would most likely, under all the circumstances then surrounding the firm, the construction company, and the railroad company, have resulted disastrously to the firm, not only as to that contract, but as to the 50-mile contract also, while delay could harm no one, and conduce to the benefit of all the firm. It cannot, therefore, be fairly said that the plaintiffs delayed suit that they might speculate on the chances which the future would give them of avoiding the risk if the venture proved unprofitable, and asserting their claim if the contract resulted in gain, since the defendants had the full opportunity to defeat such contingency by recognizing plaintiffs' rights when the claim was made for an interest in the contract, accompanied by an offer to share its burdens; indeed, they elected to take all the risk when they determined to fraudulently exclude their partners, and should not now be allowed, in a court of equity, to profit by their wrong.

AHOLTZ v. GOLTRA.

114 Ill. 241.

(1885.)

Scott, J. The bill in this case was brought by Frederick Aholtz and George Stare against Isaac V. Goltra, Edward O. Smith, and William W. Foster in the Circuit Court of Macon county, and is for an injunction and relief. It is alleged in the bill that defendants Goltra and Smith recovered a judgment at law in the Circuit Court against complainants on an appeal-bond in the sum of $300, with interest and costs; that they had caused an execution to be issued on such judgment; and that defendant Foster, who is sheriff of Macon county, is about to levy the same on the property of one or both of complainants. No complaint is made against the regularity or justness of the judgment. It was recovered in an action of debt on an appeal-bond, wherein complainant Aholtz was principal and his co-complainant Stare was surety for

him. It is alleged that complainant Aholtz was the owner of certain town lots in Blue Mound, in Macon county, with a dwelling-house situated thereon; that Goltra and Smith, by wrongful means, and by collusion with a then tenant of Aholtz, got possession of the house and premises without his knowledge, and by themselves and their tenants, since April, 1875, for a period of over eight years, forcibly kept the possession from complainant Aholtz; that he had only recently regained possession of the premises; and that during the period defendants withheld the same from complainant they were reasonably worth the sum of $120 for each year, amounting in the aggregate to the sum of $1,000. There is also an allegation in the bill that the premises were damaged by the defendants or their tenant to the extent of $50, which, together with the reasonable rent due, makes a total sum of $1,050 due from defendants Goltra and Smith to complainant Aholtz. The prayer of the bill is that an account may be taken, by and under the direction of the court, (1) of the amount due to defendants Goltra and Smith on the judgment in their favor; and (2) for an account of the reasonable rental value of the premises and improvements thereon during the time the defendants held the same and kept complainant Aholtz out of possession; that one claim be set off against the other; that the amount that may be so found to be due to defendants on such judgment, with the interest and costs, be first paid and satisfied; and that complainant Aholtz have a decree against Goltra and Smith for the remainder, for whatever may be found due to him for the reasonable rent and damages to the premises, and in the meantime that an injunction issue restraining the sheriff from levying the execution on the property of either complainant, and for general relief. To the bill stating these facts and others, some of which may be stated further on, with sufficient fullness, the court sustained a demurrer, and dismissed for want of equity. That decree was affirmed in the Appellate Court of the third district, and complainants bring the case to this court on their further appeal.

It very clearly appears complainants have a full, complete, and adequate remedy at law, and their bill was therefore very properly dismissed on demurrer, as was done, for want of equity. The bill contains no allegation whatever that would warrant a court of chancery to assume jurisdiction. It is nowhere alleged defendants Goltra and Smith, or either of them, are insolvent, and no reason is shown why complainant Aholtz may not proceed at law to recover whatever, if anything, may be due to him from either or both defendants. The only ground suggested in the bill is that neither defendant resided in Macon county, so that process from the Circuit Court of that county could be legally served upon them. It is averred that Smith is a non-resident of the state, and that Goltra is a non-resident of Macon county, but that the latter-named defendant resides in Sangamon county, in this state, which, of course, is the next adjoining county to Macon. No reason is shown why complainant Aholtz cannot pursue him remedy at law against Goltra and recover anything that may be due him, either from him or from Goltra and Smith. No ground whatever is suggested for equitable relief, and as it does not appear but complainants had a full, complete, and adequate remedy at law, they will be remitted to a common-law court for the recovery of anything that may be due to either of them. The claims they insist upon, if valid, are legal claims, and no reason appears why equity should assume jurisdiction to adjust them.

The judgment of the Appellate Court will be affirmed.

LESTER v. STEVENS,

29 Ill. 155.

(1862.)

Caton, C. J. At the time this plea to the jurisdiction of the court was filed, there were four defendants, one of whom, the sheriff of Ogle, had been brought in and made a party by the amended bill. The plea avers

that Willard and Pearce, "the major part of said defendants," reside in Cook county. The averment that two is the major part of four does not make it so; nor does the setting of a plea for hearing admit that which cannot be true. Now, our statute says that the suit shall be commenced in the county where the defendants, or a major part of them, reside; this, if it were possible to raise the question, would put beyond the jurisdiction of any court a vast number of suits where there are several defendants, for it is very common that a major part of the defendants do not reside in any one county; and but for the rule that every plea to the jurisdiction must give a better writ, and show affirmatively that some other court can take jurisdiction, there would be a failure of justice in such cases. In order to make this plea good, we must find in it the facts which would give some other court jurisdiction. We only learn from the plea that two of the four defendants reside in Cook county. This is not sufficient to give that court jurisdiction under the statute, any more than the residence of the other two in Ogle would give that court jurisdiction. It gives the party no better writ, and he may stay where he is till he is shown a better one.

The next objection is that this is a bill to restrain the collection of a judgment rendered in the Circuit Court of Cook county. If this were the primary object of the bill, it would undoubtedly be fatal to the jurisdiction of the court, but it is not so where the principal object of the bill is for other relief, and the stay of the collection of the judgment is incidental or auxiliary, and for the purpose of making the relief complete for which the bill is filed; and for the purpose of determining these questions, even on such a plea as this, we must look into the bill itself. If the plea avers that there are but three defendants, or that two is a major part of the defendants, which is the same thing in substance, that averment in the plea cannot avail against the fact that there is on the face of the bill manifestly four defendants; and so when we can see that the principal objects of the bill are other

than the stay of the execution, and that that is but the incident, the averment of the plea to the contrary cannot avail.

Here the principal objects of the bill are to be relieved from a mortgage or trust deed, and a sale made under it on account of usury; and the stay of the execution in the hands of one of the defendants is introduced as incidental to that main object. Whether, in the attainment of that main object, the complainants can obtain relief from that judgment, is not before us on this plea. The bill may be obnoxious to a demurrer for multifariousness, or for want of equity, or for any other cause, without affecting this question, which is one of jurisdiction only.

We think the plea was insufficient to oust the court of its jurisdiction, and that it should not have been sustained. We have treated what the party calls a demurrer to the plea as simply setting the plea down for hearing, which is the proper mode of raising the question of the sufficiency of a plea to bill in chancery, because the court below so treated it. The court would have been justified in disregarding the paper called a demurrer, as inappropriate to such a pleading.

The decree is reversed, and the suit remanded.

Decree reversed.

JEWETT ET AL., COMMMISSIONERS, v. SWEET.

178 Ill. 96.

(1899.)

Boggs, J. This was a bill in chancery by appellee for an injunction restraining the appellants, in their official capacity as commissioners of highways, from cutting a certain ditch and waterway through a highway and turnpike road upon which the farm of appellee abuts. Decree as prayed was awarded by the chancellor, and on appeal the decree was affirmed by the Appellate Court for the Second District. This is a further appeal by the said commissioners.

The opinion of the Appellate Court, rendered by Mr. Justice DIBELL, is as follows:

"Appellee owns the southeast quarter of the northeast quarter of section 7, in the town of Harrison, in Winnebago county, and a tract of twenty-four acres next south thereof. John Dolan owns land north of appellee. The heirs of Catherine Grattan, deceased, own lands west of Dolan, and own the southwest quarter of the northeast quarter of said section 7. William Bodine owns a twenty-acre tract south of the Grattan lands. The Grattan and Bodine tracts are therefore next west of the two tracts owned by appellee. Between the lands of appellee and Dolan, on the one side, and of Grattan and Bodine, on the other, is a north and south highway. About three-eighths of a mile north of appellee's land, Otter creek flows in a general easterly direction, and crosses the highway, and there is a bridge in the highway at that place. About half a mile directly west from the southern part of appellee's land is a lake or pond, the natural and ordinary outlet of which is due north into Otter creek. In times of high water the pond also overflows in a northerly and easterly direction. Several natural draws or depressions cross the highway south of the creek, and carry off these waters. There is one bridge across such a draw opposite the south part of Dolan's land, and three bridges cross three such draws opposite the north part of appellee's land. Some forty years before this suit was begun, the then owner of the Grattan and Bodine lands dug a ditch east and west on the north line of Bodine's present land, extending back from said highway eighty rods Said ditch was dug to carry a part of said overflow off the lands here called the Grattan and Bodine lands, and to carry it to the highway. The highway authorities at that time built a sluiceway across the highway at that point to let said waters across the road. At or about that time a ditch was dug in the highway on the east side thereof, which received said waters to a greater or less extent, and conveyed them north to the draws before mentioned. At some time, variously estimated by the wit-

nesses at from seventeen to thirty years before this suit was brought, the highway authorities closed said ditch on the east side of the highway, took out said sluiceway at the east end of said Grattan and Bodine ditch, turnpiked said road, and dug a deep ditch on the west side of said turnpike, which received the waters from said Grattan and Bodine ditch, and conducted them north to said draws and bridges. In the spring of 1897 the highway commissioners of said town decided to cut through the turnpike at a point 135 feet north of the place where said old sluiceway had formerly been, and 315 feet south of the most southern of the existing bridges, and to put in a bridge across the turnpike at that point, and thus to provide a way across the highway for the water coming from the west, and from the Grattan and Bodine ditch, and to discharge said water upon appellee's land at that point. Thereupon appellee began this suit, by filing a bill to enjoin the commissioners from cutting through said turnpike and putting in said bridge at that point. He set out the facts as to the location and ownership of the land, the waters and their natural outlets, the bridges already in existence, the Grattan and Bodine ditch, and the highway ditches; and he charged that to open said turnpike and put in said bridge would take said waters out of their natural course, and cast them upon his lands to the east of said proposed bridge, and irreparably injure them. A preliminary injunction was granted, and the commissioners answered. Proofs were heard, and there was a decree making said injunction perpetual. From that decree the commissioners now appeal.

"The commissioners, in their answer, do not claim that the proper care of the highway requires the new bridge to be put in and the proposed cut to be made through the turnpike. They do not set up in their answer that the highway, in its present condition and with its present bridges, is in any respect defective or out of repair. They do not seek to justify their proposed action on the ground that it will in any respect improve the highway. They do not suggest in their

answer that they are acting for the public good. Neither in their answer nor their proofs do they deny that complainant's lands will be injured by their proposed course, and they do not offer to restore the ditch on the east side of the highway, which was some protection to the land on that side of the road when said former sluiceway was in existence at the end of the Grattan and Bodine ditch. The answer does assert the right of the commissioners to open the turnpike and build the new bridge, regardless of its effect upon appellee's land, and it places that claim of right upon two grounds.

"The answer is, first and chiefly, devoted to the claim that the Grattan and Bodine ditch was lawfully dug by the man who then owned the lands west of the road, and that it and the sluiceway across the highway at the end thereof were constructed with the approval of the man who then owned the land east of the road, appellee's grantor; that the highway commissioners ought not to have taken out said sluiceway, and that to do so was a wrong against the owners of the Grattan and Bodine lands; and the highway commissioners here set up and pleaded the rights which they claim exist in the owners of said lands west of the highway by reason of what occurred forty years before between the adjacent landowners. The Grattan heirs and Bodine are not before the court. They have not asked any relief against appellee. We are of opinion the highway commissioners have no right to injure appellee merely for the purpose of benefiting Bodine and the Grattans. If the Grattans and Bodine have any contract rights or any equities against appellee because of what occurred between their respective grantors when the Grattan and Bodine ditch was dug, that is a matter for the interested parties to litigate, if they desire; but we think the highway commissioners should not take it upon themselves to determine those questions, nor to initiate this change in the course of the water, and carry on litigation for the benefit of Bodine and the Grattans.

"The answer secondly claims that the natural flow

of the water from the west is across the highway at about the point of the proposed bridge, and therefore the commissioners may build a bridge there if they choose. We think the preponderance of the evidence is that the water from the lake or pond in question would never reach the place where the commissioners planned to put in the new bridge but for the Grattan and Bodine ditch, which ditch, we think the evidence shows, was cut through a rise of ground which would have prevented the waters from the pond coming into a state of nature to the point where it was proposed to locate the new bridge. The result of building such bridge will be to cast upon appellee's land water which would not have come upon that part of his farm in a state of nature, but which would have passed northeasterly over the lands of Bodine and the Grattans, and reached the highway at one of the bridges already in the road. The commissioners have no right to do this, and injunction is a proper remedy to prevent the wrong. Graham v. Keene, 143 Ill. 425, 32 N. E. 180.

"It is argued that to carry this water to the old bridges through the ditch on the west side of the highway is to discharge it where they have no right to carry it. We think the proof shows that is the place the overflow would have reached the highway if the Grattan and Bodine ditch had not been dug, and it is the point to which the highway commissioners have carried it for not less than seventeen, and perhaps thirty, years; and, when it crosses the highway at that point, it discharges upon the lands of appellee, and not upon the lands of some stranger, but at the point where said overflowing waters crossed his land in a state of nature, and where, therefore, he is bound to receive them.

"Some attempt was made by defendant to prove that the condition of the highway was such that this bridge was needed, or that to put in the new bridge would benefit the highway. The rule that a party cannot make one case by his pleadings, and a different case by his proofs, is applicable to a defendant as well as to a complainant. The defendant is bound to apprise

the complainant, by his answer, of the nature of the case he intends to set up, and cannot avail himself of any matter of defense not stated in his answer, even though it appears in evidence. Johnson v. Johnson, 114 Ill. 611, 3 N. E. 232. By filing an answer, the defendant submits to the court the case made by the pleadings. Kaufman v. Weiner, 169 Ill. 596, 48 N. E. 479; Holmes v. Dole, Clarke, Ch. 71. As the answer in this case does not assert any public necessity for the proposed bridge, nor that the highway will be improved thereby, complainant was not required to meet that defense, and defendants cannot ask a decree in their favor because of any evidence which they introduced on that subject. But the proof shows the commissioners have permitted the ditch on the west side of the road to become filled and clogged up to some considerable extent, and have let willows grow in it, and corn stalks, straw, hay, and stubble to accumulate against the willows, to the serious obstruction of the flow of the water, and have let long grass grow under the present bridges. We conclude from the evidence that, if the highway commissioners will remove the obstructions in that ditch, and under the existing bridges, the proposed new bridge will not be required for the benefit of the highway. We think the answer shows this was not the reason why they planned to cut the turnpike and put in the bridge. For the reasons stated, the decree of the court below will be affirmed.''

We find the conclusions arrived at by the Appellate Court as to the matters of fact involved in the case abundantly supported by the proof. The principles of law announced in the opinion are in accord with our views. There seems no reason why we should indulge in further observations as to the case. The opinion of the Appellate Court is adopted as the opinion of this court, and its judgment is affirmed.

Judgment affirmed.

MAHAR v. O'HARA,

9 Ill. 424.

(1847.)

Opinion of the court by CATON, J. On the 20th of July, 1840, Helen Mahar filed her bill in the [*426] Randolph Circuit Court to enforce the payment of a contingent legacy secured to her by the last will and testament of Henry O'Hara, against James O'Hara, executor and residuary legatee of the said Henry O'Hara. The bill states that before and at the time of the death of the said Henry O'Hara, she was his wife, and that on the 20th of June, 1826, he made and published his last will and testament in due form of law, whereby among other things he gave to his son James, the present defendant, his homestead except certain specified portions which he gave to other devisees; and after making various other bequests and devises, the testator declared it to be his desire, that those of his children who then resided with him should continue to reside on the plantation after his death, with his son James, and that his wife Helen, the present complainant, should continue to reside there and act as mother to his children and to her own, and that they should reside there together so long as they could agree; but in case the complainant should desire to reside by herself, James should build her a comfortable dwelling house convenient to a good spring of water, and should deliver to her one hundred bushels of corn, twenty bushels of wheat and five hundred pounds of pork, annually. By the will, also, there were a considerable number of specific bequests made to the complainant, although of no great value. The bill then declares that inasmuch as he had given the principal part of his estate, and requested him to make the several payments as before expressed, to the other legatees and to the complainant, he appoints him, the said James, his executor.

The bill then avers, that soon after the death of the testator, to wit: on the 3d day of July, 1826, James O'Hara proved the will, and took upon himself

the execution thereof, and possessed himself of [*427] all the real and personal estate of which the said testator died seized, and possessed and accepted the real estate and personal property, which by the said will were devised and bequeathed to him. The defendant delivered to her all of the specific property bequeathed to her in the will, and built the house as directed in the will for her, and delivered to her the provisions as specified in the will till the year 1830, since which time he has refused to pay the said annuity, although she has ever since lived separate from the said James; that the said defendant has, ever since the death of the said testator, received, accepted and enjoyed the real and personal estate bequeathed and devised to him, of the value of $5,000.

The defendant in his answer admits all of the material allegations of the bill, except that he denies that real and personal estate which he received by the will, was worth $5,000. He admits that he had refused to pay the annuity for the time mentioned in the bill, for the reason that she had ceased to live in, and occupy, the house which he had built for her on his premises, but had married a man of the name of Mahar and removed to the state of Missouri.

A replication was filed and proofs taken, and the cause was heard by the court below, and the bill dismissed with costs, in April, 1843, which decree we are asked to reverse, and to render a decree in favor of the complainant according to the prayer of the bill.

As the jurisdiction of a court of equity is questioned, that will be first considered. The several Circuit Courts of this state in their respective circuits, have the same jurisdiction in chancery which the court of chancery in England has, except where its jurisdiction is limited by express statute, or by necessary implication, as where some other court may be vested with exclusive jurisdiction of the particular matter. Our courts are vested with the same powers and are governed by the same practice; or agreeably to such rules as may be established by said courts, except where particular provision is made by our statute.

Without stopping to inquire into the general jurisdiction of courts of equity over the administration of estates, either exclusively, or concurrently [*428] with the ecclesiastical courts in England, or in this country the probate courts, it is sufficient to observe, that the jurisdiction of the courts of equity in cases of legacies, has been firmly established, and beyond controversy, at least since the time of Lord Nottingham. The grounds of that jurisdiction are various, and most satisfactory. 1 Story's Eq. Jur. Chap. 10. In equity, executors and administrators are trustees, and so also is a devisee who takes a devise, chargeable with legacies or debts. No better illustration could be desired, than the case before us. Here the testator devised an etsate to his son, who also he made his executor, and in consideration of the devise, he imposed upon his son the burthen of supporting the widow of the testator in his family, so long as they could agree, or she should choose to reside there, and when she should choose to live by herself, he should build for her a house, and furnish her annually with a specified quantity of corn, wheat and pork. Now, in equity he is considered a trustee for the purpose of executing these provisions in favor of the widow, and by accepting the estate he assumed the trust, and the estate thus devised is not only chargeable in equity with the trust, but by accepting the devise he became personally responsible for the payment of the legacy, according to the provisions of the will. Indeed, without the aid of the searching powers of the court of equity, estates might never be fairly settled, frauds would go undetected, and legacies but too frequently would remain unsatisfied, and the intention of testators would be defeated. But so far from the jurisdiction of the courts of equity in cases of legacies being taken away by our statutes, it is expressly confirmed. The 131st section of our statute of wills, among other things, provides: "And every executor, being a residuary legatee, may have an action of account, or suit in equity against his co-executor, or co-executors, and recover his part of the

estate in his or their hands; and any other legatee may have the like remedy against the executors; provided, that before any action should be commenced for the legacies as aforesaid, the court of probate shall make an order directing them to be [*429] paid.'' Now nothing more need be said on this subject of jurisdiction, except perhaps to give a proper construction to the proviso in the last clause of the section, as some might suppose that the legislature had made so absurd a law as to tie up the hands of the courts of equity, as well as all other courts, in all cases of legacies, no matter how complicated, extraordinary or difficult the case might be, whether involving a construction of the will or not, till the court of probate had made an order for the payment of the legacy, thus making the court of chancery a mere instrument in the hands of the Probate Court, to carry into effect its orders and judgment. Such a construction should not be adopted, unless the language of the law will admit of no other. In this case, however, we think we may safely say, that the legislature meant no such thing. In the preceding part of the section, two modes are prescribed for enforcing the payment of the legacies, one by action of account and the other by suit in equity; and the proviso declares that before any action shall be commenced for legacies as aforesaid, an order shall be made by the Probate Court, etc. This clearly applies only to cases where the action of account shall be commenced, for the term *action* is never properly applied to a suit in equity, nor is *suit* a proper designation for an action of account. The proviso, therefore, does not apply to a suit in equity to enforce the payment of a legacy.

It is next objected that the husband of the complainant should have joined her in the bill. The objection would have been fatal beyond all doubt if the answer had only shown that she had a husband living. Apparently, not with a view of showing a want of proper parties, but for the purpose of presenting an excuse for not paying the annuity, the answer states that the

complainant was married to one Mahar in 1831 or 1832, but it does not state that he is still living. If he had been, we are not to presume that the answer would have omitted to state it. Like any other pleading, nothing is to be presumed in favor of the [*430] answer. By the same rule, had the bill shown the marriage to Mahar, it would probably have been necessary to have went on and shown a sufficient reason for not making him a party.

We will next inquire into the proper construction of this will, or that portion of it which is relied upon as the foundation of this suit. I have before shown that, by taking the estate devised to him, he assumed to pay the legacies imposed upon him by the will. Messenger v. Andrews, 4 Eng. Ch. R. 479. It is, therefore, only necessary to inquire what the complainant is entitled to under the will.

It is insisted upon by the counsel for the complainant that he was only bound to provide her with a house, and furnish her with the provisions during the time that she resided by herself, in the house built for her, and not after her marriage to Mahar. This is the clause relied upon: "But in case my wife shall choose to separate from them (James and the other children) and desire a residence to herself, I direct that my son James shall build her a comfortable dwelling house, on his part of the land above given him, convenient to a good spring of water, and to deliver to her one hundred bushels of corn, and twenty bushels of wheat, and five hundred pounds weight of good pork annually." To say that the testator intended that she should have the provisions no longer than she lived in the house by herself, is almost as unreasonable as to say that she was not intended to have the house any longer than she should eat all the provisions herself. It cannot be presumed that he intended to compel her to reside in that house, whether it suited her convenience or not. By residing to herself, is only meant a residence away from the family of the defendant. A refusal to enjoy one portion of the provision did not deprive her of her right to the

other; nor can we reasonably infer that the testator intended to prohibit her marrying, should she desire to do so, by limiting this bounty to her during her widowhood. The law is averse to any provision in a will or other instrument in restraint of marriage, as being against the interest of the state, and it will not attribute any such intention to the testator, unless his language will bear no other reasonable construction. If a testator design to exercise a control [*431] over the acts and happiness of those who shall live after him, not for their own good, but from mere caprice, or from an apprehension that he may be forgotten, he must at least manifest such an intention clearly, or else we cannot attribute to him such a design. While it may be admitted that a testator may impose reasonable restraints upon his legacies, against improvident marriages, yet there are many cases which show that an absolute prohibition of marriage will be disregarded, either in a bequest or a gift; and such may be the law as a general rule, yet it is said, and I think with truth, that an annuity to a widow during widowhood is not void by the common law, although it generally was by the civil law (1 Story's Eq. Jur., sec. 285, note 4); but such conditions are held to great rigor and strictness. Long v. Dennis, 4 Burr. 2055; Parsons v. Winslow, 6 Mass. 169. However, as this question in its full extent does not necessarily arise in the decision of this case, I shall refrain from a review of the authorities on the subject, or from attempting to point out the mere distinctions which will be found to prevail on this subject. Enough has been said to show that by no legal or reasonable construction does this will provide that this annuity was limited to her during her widowhood; and this legacy was far from being a gratuity to the complainant, and at the expense of the defendant, for by accepting it she has lost her right of dower, which, if we may judge from what appears in the record, would have been of vastly greater value than this pittance of about $60 a year, and the use of a house; and this loss of dower has been a direct gain to the defendant, who took the

lands discharged of it, so that he received directly from her much more than an ample consideration for all that she claims of him; and it does seem to me that it is most ungracious in him to refuse to pay this small annuity, yet it is his right, if he thinks he has a legal defense, to make it, yet certainly he ought not to expect a very strained construction in his favor.

What has been already decided substantially determines this case without looking particularly into [*432] the depositions, for although the defendant denies that the estate which he received by the will was worth $5,000, as charged in the bill, yet he has not stated how much less it was worth. The proof, however, is that it was worth at least $3,000; but I apprehend that this makes but very little difference. Some question was also made on the argument as to the sufficiency of the demand made of the defendant for the annuity, yet the demand is not only sufficiently established by the proof, but the defendant, in his answer, admits that he has refused to pay it ever since her removal from the house which he built for her, and since the time charged in the bill.

The case made by this bill vests the court with the right, not only to declare the right of the complainant to an annuity for life, but to secure and enforce its payment, as well for the future as for the past, which may be well done here under the general prayer, and in this case most particularly should it be done, to avoid the expense and vexation of an annual suit to recover the annuity as it may fall due. The decree of the Circuit Court must be reversed and the cause remanded, with directions to that court to enter a decree declaring the complainant to be entitled to the use of the dwelling house mentioned in the pleadings, which was built for her by the defendant, during her natural life; also that she is entitled to recover of the defendant the value of the said annuity of corn, wheat and pork, from and including the year 1831, till the time of filing this bill; also that she is entitled to recover, in like manner, the said annuity from the said defendant from the time of the commencement of the

said suit up to the time of rendering said decree, in case it shall be found that the said defendant has refused to pay said annuity in kind, according to the directions of said will; and if there has been no such refusal, then she is entitled to receive the amount of said annuity in kind, during the time aforesaid, of the said defendant; also that she is entitled to receive from the said defendant the said annuity in kind of the said Court have an account taken, to ascertain the amount due the complainant up to the time of rendering [*433] said decree, either in money or in kind, and that it enforce the payment thereof, either by execution or attachment, as the case may require; and also that the Circuit Court enforce the payment of the said annuity by the said defendant, from time to time as it may fall due, either by attachment or otherwise, as the case may require, upon proper application, made by the said complainant under that decree, and that the defendant pay the costs. As it was stated upon the argument by the complainant's counsel, that the defendant is amply responsible, the decree need not make the said annuity a lien upon the land devised to the said defendant in and by said will, unless it shall be found to be necessary by a subsequent application to be made to the Circuit Court.

The decree of the Circuit Court is reversed with costs, and the cause remanded with directions for further proceedings according to this opinion.

Decree reversed.

DOWDEN v. WILSON,

108 Ill. 257.

(1884.)

Mr. Justice Walker delivered the opinion of the court.

Appellee in this case filed a bill in the Ford Circuit Court, against appellants, to foreclose a mortgage given on a tract of land in that county, to secure three promissory notes, amounting in the aggregate

to $1,000. This is a second suit commenced in that court to foreclose the same mortgage. The first bill was filed by the same complainant against the same defendants. That case was heard, a decree rendered, and appealed to this court, where the decree was reversed, and the cause ordered to be remanded, but the order was not applied for or issued within two years, and the case became discontinued.

On the trial of this case it was proved that the records and files of the former case were destroyed by the burning of the clerk's office of that court. On the hearing appellants offered and read in evidence copies of two depositions of defendant Dowden, taken and read in evidence on the trial in the former case. The copies were from the transcript of the record in this court, and were properly certified to be true copies by the clerk of this court. They were read on the hearing, subject to the objections of complainant. There had been filed among the papers of this case, at or before the hearing, an agreement between counsel of the respective parties that counsel for defendants might, on the hearing, read the transcript of the record in this court, but being unable to procure leave to withdraw it for the purpose, on an application he procured the copies thus certified, and complainant's counsel objected because they were copies. In deciding the case the court, it is claimed, declined to consider the copies of these depositions. When the case was heard and submitted at the April term, 1882, the court took the case under advisement, to be decided in vacation, and on the 30th day of August following a final decree foreclosing the mortgage was filed, entitled of the preceding April term, and recorded by the clerk as of that term. Subsequently appellants' counsel, on the 4th day of October, 1882, applied to the judge in vacation for an order for a rehearing, but the application was denied, and defendants perfected an appeal to the Appellate Court for the Third District, where the decree of foreclosure was affirmed, and they appeal to this court.

The first question we shall consider is, whether the

judge erred in refusing, on the application in vacation, to grant a rehearing of the case. We regard the 47th section of chapter 37 as settling the practice in such cases. It provides that where a cause or matter is taken under advisement, and it is decided in vacation, the judgment, decree or order may be entered of record in vacation, but such judgment, decree or order may, for good cause shown, be set aside, or modified, or excepted to at the next term of the court, on motion filed on or before the second day of the term, of which the oppsite party, or his attorney, shall have reasonable notice, and if not so set aside or modified, it shall thereupon become final. This section afforded appellants the opportunity, at the December term, 1882, to apply and show cause for setting aside the decree and obtaining a re-trial. The statute does not contemplate such an application in vacation, nor can we see the slightest necessity for such a practice, as all can be had by an application in term time that could be in vacation. Where the statute has prescribed one mode of accomplishing a purpose, which is full and complete, it must be presumed that other modes were intended to be excluded. Nor were defendants deprived of this right by the decree being entitled of, and the clerk recording it as of, the April term. That could be done only as prescribed by the 48th section of the same act. That section requires the consent of the parties to authorize a decree rendered in vacation to be entered as a decree of the term at which the case was submitted and taken under advisement. The record in this case shows no such agreement, and inasmuch as appellants took no steps to set aside the decree at the December term, they have waived all right to have the decree set aside, and to have a re-trial.

Inasmuch as the copies of the depositions of Dowden were read in evidence, they must be considered, unless complainant's objection was well taken. Were they properly admitted under the agreement that the record might be read? We think they were. In substance and in fact there was not a particle of difference between that portion of the transcript and the true copies

that were read. It is a mere quibble to say that they are not the same in substance, or to say that complainant was taken by surprise, or that he sustained a particle of injury by reading the copies instead of the originals as contained in the transcript on file in this court. Although copies were not specifically named in the agreement, they were within the implication and spirit of the agreement, and were properly admitted, and should have been considered by the court below. But we, on an appeal in a chancery case, consider all the evidence properly in the record, and must consider the depositions in connection with the other legtimate evidence in the case.

Having disposed of these preliminary questions, we shall proceed to consider the case on its merits. Does the evidence sustain the decree? There is no question that the notes were given for the purchase of a patent right to a brake for wagons, etc. There was no other consideration for the notes or the mortgage securing them. Had appellants been fully satisfied, the brake was worthless, why did they not, in the years that have elapsed since the decree was reversed, have a brake constructed, and its quality fully tested? It would have required but slight expense or trouble. It was not done, and no doubt because it would in all probability have proved to be all that it was represented. None of the witnesses, except one, pretend ever to have seen a brake made from this model, and he only saw it attached to a wagon standing still. It is not probable that he could, from the standing wagon, form a correct opinion as to its working in descending a hill, when its operation would be tested. None of the other witnesses ever saw anything more than the model, and they say that they had seen others that were worked on the same principle, and this was worthless. They only state their opinions. They do not state or explain the principle, or give any reason why it would not work. Although they say they are experts, we fail to see they were.

Again, independent of that, the defense fails for other reasons. It is claimed that the invention was

not new, and that fact is proved by the evidence, and not being true, there was a fraud perpetrated on appellants, and the consideration had failed. On turning to the answer we find that no such representation is alleged to have been made when Wilson purchased. The allegations and proofs must agree to render a defense available. Whatever the proofs may establish, there is no allegation in the answer that the patent was represented to be a new invention, and hence this evidence has no application to the answer, as that is not set up as a defense. The other representations were only such as are usual in commending an article for sale, and were not fraudulent, and require no further consideration. Moreover, appellants, so far as we can see from the record, have never offered to release or cancel the deed conveying to them the right to manufacture and vend the brake, nor do they offer in their answer to do so, but so far as we can see they still hold the right to manufacture and vend the brake. Even if there was fraudulent representation set up as a defense, or failure of the consideration in the purchase, appellants should have restored, or offered to restore, the title to the patent to the vendors. They have no right to hold that and escape paying the consideration for the notes and mortgage. What else the proofs may show, there is no allegation or proof that the title was reconveyed, or offered to be reconveyed. This, of itself, precludes appellants from insisting upon the defense.

For these reasons the decree of the court below is affirmed.

Decree affirmed.

ASHMORE v. HAWKINS.

145 Ill. 447.

(1893.)

Wilkin, J. It appears from the record that on the trial more than fifty witnesses testified before the jury, about an equal number testifying on behalf of either

party. The principal question submitted to this court is, does the evidence sustain the decree? And the decision of that question depends upon whether the proof of the mental incapacity of James Hopkins produced upon the trial was sufficient to authorize the verdict of the jury. We have examined the evidence bearing on this question, and, weighing it, as we are compelled to do, without reference to the appearance and conduct of the witnesses on the stand, are of the opinion that, if no other evidence had been submitted to the jury than that introduced by the complainants, it would have been justified in finding as it did. The evidence of the witnesses is in irreconcilable conflict. We think the fact that the grantor was mentally and physically enfeebled by old age at the time he made the deeds in question was clearly proved, but whether that enfeebled condition had reached the point of incapacity to transact the ordinary business affairs of life, is by no means clear. The court below and jury saw all the witnesses, and heard them testify, and were better able to judge of the weight of their testimony than is this court. Speaking on this subject in the recent case of Wilbur v. Wilbur, 138 Ill. 446, 27 N. E. Rep. 701, we said, repeating what had been frequently said before: "It was therefore the province of the jury to determine which was entitled to the greater weight, and in such case this court will not interfere, even though, as an original proposition, it might have arrived at a different conclusion. This rule is so well established, and supported by so many decisions of this court, that neither reason nor authority need be given for applying it to this case." The same language must be applied to the present case.

Counsel for appellants contend that the court below erred in not providing in its decree for the repayment of $100 per year paid by them since the year 1885, as well as taxes paid on the land conveyed to them. As to this point it is only necessary to say that no such affirmative relief was asked by the pleadings.

There being no errors of law insisted on by appellants, as to the admission or exclusion of testimony,

or to the giving or refusing of instructions, and the evidence being sufficient, under the above stated rule, to support the verdict of the jury, the decree of the Circuit Court must be affirmed.

CUMMINS v. CUMMINS,

15 Ill. 34.

(1853.)

Scates, J. This bill was filed by the ward against the testamentary guardian for an account, charging that lands and moneys had come into his hands as guardian.

The guardian answers, admitting that, in recovering the estate of the ward out of the hands of the executor of the will, *he had acquired title to [*34] certain lands purchased under an execution on a judgment against the executor for $418.75, and conveyed to him on 7th November, 1843. He admits assets to the value of this land to be $427.12, and then states and sets up an account for maintenance and education and expenses exceeding the assets.

The cause was heard upon bill, answer, replication, and exhibits, without proofs, and the bill dismissed.

This is erroneous, according to the rules of pleading; the answer is evidence only so far as it is responsive to the allegations of the bill; so far as matters in discharge are stated in the answer, they must be proved, unless in cases where the same matter or statement that creates the charge shows also its discharge. Here it was a distinct and independent matter, and should have been proven. 12 Pet. R. 191; 1 Greenl. Ev., sec. 351; 2 Story's Eq. Jur., secs. 1528, 1529. Upon these principles complainant was entitled to a decree for an account.

The dismissal was erroneous in another respect. Courts of equity exercise a strict supervision over the expenditures of guardians, requiring the application of the income of the estate to the support and education of the ward to be satisfactorily shown, so far as

needed for that purpose, and the surplus, if any, to be kept productive. But they seldom sanction the use of the principal, even for these purposes, unless a very clear case of its necessity is made out to the court for so ordering. 2 Fonbl. Eq. 473, 474; Davis, Adm'r, v. Harknesse et al., 1 Gilm. R. 177; Davis et al. v. Roberts, 1 S. & M. 553.

Much stricter still is the rule when a guardian breaks it upon the principal, without first obtaining an order of a proper court authorizing him to do so. 1 Gilm. R. 177.

The decree is reversed and the cause remanded.

Decree reversed.

SWIFT v. SCHOOL TRUSTEES,

14 Ill. 493.

(1853.)

Treat, C. J. This was a bill in chancery to foreclose a mortgage, brought by the trustees of schools against Palmer, Rue, Morris, and Swift. The bill set forth the execution of a mortgage by Palmer to the complainants; a conveyance of the premises by Palmer to Rue, subject to the mortgage; a conveyance by Rue to Donnell; and a conveyance by the latter to Morris in trust for Swift, both of whom had notice of the mortgage. The bill was taken for confessed against Palmer and Rue. Morris and Swift, in their answers on oath, expressly denied all notice of the mortgage. A decree of foreclosure was entered, and Morris and Swift sued out a writ of error.

As the mortgage was not registered, the defendants had no notice of its existence from the records. The bill alleges that the conveyance to Rue was made subject to the mortgage; and as the defendants derive title through him, it may perhaps be that such a condition in the deed would operate as notice to them of the mortgage. But the deed was not produced in evidence, and there is nothing in the case to sustain this allegation. The only proof to establish the charge

of notice consists of the testimony of a single witness. That is not sufficient against the sworn statements of the answers. The allegation of notice is distinctly denied in the answers. That part of the answers is clearly responsive to the bill, and is evidence for the defendants. And it must prevail, unless the complainants sustained the charge of notice by two witnesses, or by one witness and strong corroborating circumstances. Such is the well established rule of equity. The testimony of one witness is not sufficient to overcome the positive denial of a material allegation of a bill. The effect of the answer is only neutralized by the opposing testimony of a single witness. It [*495] is but oath against *oath. Further testimony is necessary to incline the scale, and give a preponderance on the side of the complainant.

The decree is reversed, and the cause is remanded.

Decree reversed.

WALLWORK v. DERBY,

40 Ill. 527.

(1866.)

Mr. Justice Breese delivered the opinion of the court.

This record presents but one point which we deem worthy of consideration.

Two separate tracts of land, particularly described by their government numbers, were conveyed by Roadnight and wife to Monroe, in trust, to sell, in the event that certain notes Roadnight had executed to Derby were not paid. The lands were again sold by Roadnight to the complainant, Wallwork, described as in the deed to Monroe, subject to this deed.

In the deed to Monroe is this clause:

"And also to sell said premises entire, without division or in parcels, as the said party of the second part (Monroe) may think best."

Under the power to sell, contained in the deed with this clause in it, one note for $1,800, remaining due

to Derby, and unpaid, Monroe, the trustee, at Derby's request, advertised the land, as described in the deed, to be sold at public auction. At this sale it appears in the recitals of Monroe's deed that Derby "bid for the tract first hereinafter named, the sum of $1,600." The tract first thereinafter named in the deed is the east half of the S. E. 32, town 42, N. range 11, east of the third principal meridian. This is the tract Derby bid off, but the trustee conveyed to him in addition the other tract, viz.: All that portion of the east half of N. E. of 32, lying south of the railroad, as it crossed that section on the 10th day of July, 1862, containing 100 21/100 acres, more or less.

The theory of appellees is that the two tracts were but one parcel of land, and constituted a farm, on which there were no division fences, or visible dividing lines, and that a bid for one of the tracts covered the other of necessity. That both together made up "the premises," which the trustee advertised, and intended to and did sell.

This does not appear from any of the deeds. They all describe two distinct parcels of land, containing in the aggregate 120 20/100 acres. They were "the premises" authorized to be sold, with no recital that they made a farm, or were united for any practical purpose. No information by the deed or by the advertisement of sale by the trustee, that they were any other than two separate but adjoining tracts of land, containing together a certain number of acres. Nor does it appear that any notice was given that they would be sold together as a farm.

What, then, did Derby buy? Can it be said he bought anything more than he bid for? Bidding for the first described tract, and being the highest bidder, entitled him, possibly, to a deed for that tract, but what right did it confer upon the trustee to throw in the other tract gratuitously? Derby did not bid on that, nor did he bid on the premises taken as a whole, but he bid for the first described tract only. The last described tract was not offered for sale. We are at a loss to perceive the right of the trustee to convey to

him both tracts when he only purchased one. We think the trustee has not, in this, executed the power. He could sell the property entire or in parcels. His deed should show how he sold it. By reference to that, it appears he offered the premises as an entirety, and Derby bid for one tract composing a portion of the premises, and received a deed for the whole premises. Counsel for appellees say the deed was written on an ordinary printed blank form, and the blanks filled up as circumstances required, and that in the printed part of the recitals contained in this deed, and before the premises, occur the terms to which we have adverted, "and bid for the tract first hereinafter named the sum of," etc.

Is not the printed part of a deed as much a part of the deed as the written portion, and is not a party as strongly bound by the printed as by the written parts? After this recital comes the granting clause, by which there is granted to Derby, on his bid for one tract, all those certain tracts, pieces or parcels of land situated, etc., and described as follows, to-wit: The east half of the southeast quarter of section 32, town 42 N. range 11 west; and also that portion of the east half of N. E. 32 lying south, etc. Had bidders been apprised by the notice that the purchaser of one tract would be entitled to both tracts, and that they formed but one parcel, bidding would, doubtless, have been more spirited, but no such fact was notified to the public, nor does the trust-deed, in any part of it, state that those tracts of land constituted but one parcel, occupied as a farm. Had the notice of sale so stated, and the deed of the trustee recited the fact, that the tracts were offered for sale as one parcel, a sale under the general description of premises would, perhaps, have included both tracts. It is said by appellees that it was a mere blunder of the scrivener who drew the deed that the obnoxious word, "first," was not stricken out, and that no equities on the part of appellant could grow up out of such a blunder, and that the assumption of appellant that he has such an equity is a very extraordinary assump-

tion in the face of the deed itself, the sworn and uncontradicted answers of the defendants, and proofs in the case. Again, appellees say that, upon the face of the deed itself, it plainly appears Monroe sold, and Derby purchased the entire premises therein described, and not a part. And to substantiate this, they propose to leave out of view their sworn and uncontradicted statements in their answers, and consider only the proper construction to be placed on those deeds.

Again, they say, "thus far we have been considering the case upon the hypothesis that the deed itself was the only evidence in the case of the intention of the parties thereto. But, when we take one step further, and glance into the record, we there find that the bill is not only filled with foul charges, but wishing to purge the conscience of the defendants, asks for a discovery under oath, and this the defendants have fully and fairly given, making plain, beyond a doubt or question, that which might otherwise be considered as debatable."

Again, they say, under the same head of argument: "Here, then, in addition to the deed itself, are the answers of these two defendants called for and given under oath, directly responsive to the bill, uncontradicted and uncontradictable, asserting, not merely as a matter of opinion, but proving absolutely, as a matter of fact, that the trustee offered for sale and sold, and the defendant Derby purchased and paid for, the entire lands described in the deed." And, in support of this, they refer to the old rule of chancery practice, that, where an answer, thus called for under oath, is responsive to the bill, it shall be taken as true, unless disproved by two witnesses, or by one witness and pregnant circumstances to overthrow and disprove it.

And, on the point of tender alleged by complainant, appellees say: "Derby, in his answer *under oath,* says, etc." And, again: "Here, then, we have the sworn answers of both defendants, denying positively and unequivocally these statements in the bill."

We have made these quotations from the printed argument of appellees for the purpose of making some

strictures thereon, which they seem to require. We cannot believe it was the hope or design of appellees to impose upon the court, by attempting to pass their answers upon the court as having the character they have given them, and exalting what is mere pleading to the dignity of evidence, and alleging that such answers were called for by complainant in his bill. We must believe, out of the high respect we entertain for the counsel of appellees, that their treatment of these answers, as answers under oath, and as such, *called for* by complainant, has arisen from inadvertence, with no design to mislead the court, or to derive an advantage to which the law does not entitle them; at the same time we cannot but express our surprise they should have so regarded the bill, and put in sworn answers, when, in the bill, are found these statements: "That they, and each of them, be required to answer all and singular the matters and allegations hereinbefore set forth, according to the rules and practice of this honorable court, *without oath, an answer under oath being hereby expressly waived.*"

It is, as we have had occasion heretofore to remark, bad practice to put in sworn answers to a bill wherein the oath of the defendant is expressly waived, and have rebuked counsel for so doing. But they derive no advantage from it, and can derive none, for the court will certainly find out the true nature of the pleadings, and never suffer what is but pleading—the mere declarations of a party—to assume the character of evidence, to be overcome by countervailing testimony.

These various allegations, then, in the defendant's answers are in no sense evidence; they are mere allegations of pleading, and avail nothing as evidence for the parties making them.

Disregarding the answers, the case must rest on the naked deed from the trustee to Derby, and this most unmistakably recites a bid of $1,600, $200 less than the amount due on the land, for the first named tract, under which bid the trustee conveyed to Derby both tracts. This we conceive was such misconduct

on the part of the trustee as to compel the setting aside the sale. We say nothing on the point of inadequacy of price—that of itself might not be sufficient ground for our interference. Our objection rests on the simple fact that the trustee has conveyed a tract of land he did not sell; we agree to the rule, so strenuously urged upon our attention, that the intention of parties to a deed must prevail, but that intention must be gathered from the words of the deed and surrounding circumstances. The words in this deed are express and unambiguous, and no circumstance attending the sale invites us to construe the deed differently from what we have done. The decree is reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

ATKINSON v. CHICAGO TIRE & SPRING WORKS ET AL.

138 Ill. 187.

(1891.)

Baker, J. In a suit in equity brought by the Linden Steel Company, Limited, against the Chicago Tire & Spring Works and others, a cross-bill was exhibited by Frederick M. Atkinson, the appellant, and a certain other cross-bill was exhibited by Charles H. Ferry, one of the appellees. The cause was heard on the 20th day of February, 1889, upon said cross-bill, and upon the amended cross-bill and supplemental cross-bill of Atkinson, and the amended cross-bill of Ferry, and the answers and replications; and a decree was entered dismissing the cross-bill, and the amended and supplemental cross-bills, of Atkinson for want of equity; and the finding that "the agreement referred to in said Ferry's amended cross-bill, and made a part thereof, as Exhibit A, was executed by said Atkinson and said Charles H. Ferry, and that the same is an existing and valid agreement, and not void by reason of public policy, or for any other reason; and that said Ferry is entitled to vote the said 500 shares

of said stock of the Chicago Tire & Spring Works belonging to Atkinson, and held by said Ferry under said agreement, until said $15,000, with interest thereon at the rate of eight per cent. per annum, shall have been repaid to said Ferry, as provided in said agreement.'' And the court ''further ordered, adjudged, and decreed that said Charles H. Ferry is entitled to vote upon the 500 shares of the stock of said Atkinson held by said Ferry, and standing in his name on the books of said Chicago Tire & Spring Works under said agreement of September 10, 1881, between said Ferry and said Atkinson, until said sum of $15,000, with interest at the rate of eight per cent. per annum, shall have been repaid to said Ferry in pursuance of said agreement.'' The only grounds urged for a reversal of the decree rendered upon the cross-bills are that there is no evidence in the record showing that the contract upon which the decree is predicated was ever introduced in evidence, and that said decree does not state that any evidence was heard in support thereof. We find in the record a certificate of the evidence which was heard by the court on the 17th day of February, 1887, and more than two years before the final hearing in this cause, upon a motion for an injunction upon the cross-bill of Ferry, and a motion to dissolve the injunction theretofore granted upon the cross-bill of Atkinson. But said evidence consists of *ex parte* affidavits, which were read upon the submission of said motions, and it does not appear, either from the certificate or otherwise, that said affidavits were either read or considered upon the final hearing. *Ex parte* affidavits produced on a motion to dissolve an injunction cannot be read as evidence on the final hearing, except by consent of parties, which should appear from the certificate of the judge who heard the cause. Bressler v. McCune, 56 Ill. 475. We may therefore consider said certificate of evidence as eliminated from the record.

The decree appealed from is of a twofold character. In the first place, it dismisses the cross-bills of appellant for want of equity; and, in the second place, it

grants relief upon the cross-bills of Ferry. In respect to the decree upon the cross-bills of appellant, the case of Thomas v. Adams, 59 Ill. 223, is an authority in point. There the answers to the bill of complaint put its averments in issue, and the record contained no evidence, and the decree failed to recite that the hearing was upon evidence, and the action of the court below dismissing the bill was sustained. This court in that case said: "If, on the evidence before the chancellor, complainant believed the decree was erroneous, he should have had it embodied in a certificate signed by the judge who tried the case. We must, in the absence of proof presume that the court below decided correctly in dismissing the bill. Nor was it the duty of the defendants to preserve complainant's evidence. It may be that proof was heard on the trial, but it does not appear in the transcript. We fail to find any error in the record, and the decree of the court below is affirmed."

In respect to the decree in the cross-cause of Ferry, it is recited therein that, said cause "coming on for final hearing, the court finds," etc.; setting forth the facts as hereinbefore quoted from the decree. There is no recital that the hearing was upon evidence or upon proofs. The statement in the transcript is simply that the court "finds" certain specified facts, and those facts are such as would authorize the decree that was rendered. If evidence was necessary to justify the findings inserted in the decree, ought it to be presumed, in favor of the validity of the action of the trial court, that it did hear evidence? There can be no question of the rule in this state that in all chancery causes either the evidence to support the decree must appear in the record, in some mode or other, or else the facts upon which the decree is based must be found by the court. In Jones v. Neely, 72 Ill. 449, it was recited in the decree that the same was tried on bill, answer, and proofs, and that a special master was appointed to reduce the testimony to writing, as heard in open court. In these respects that case differs from this. In that case this court used the following lan-

guage: "It is said the recital in the decree that it appearing to the court so and so, is not a recital that the matters therein stated were found by the court upon the evidence in the case. This is construing the language of the decree with unwarrantable strictness, and presuming against instead of in favor of the correct action of a court. Courts act in view of testimony, and we cannot and ought not to presume that anything appeared to the court and the trial of the cause, except what appeared from the testimony." So, in the decree at bar appears the recital that the court "finds" so and so. The court could not "find" the facts therein stated, without it did so either from admissions in the pleadings, or from the stipulations of the parties or from the evidence. In the absence of anything to the contrary in the record, this court should presume, if necessary in order to sustain the "findings," that the court did hear evidence. But, even, if the rule were otherwise, yet we think that the admissions in the pleadings in the cause sufficiently support the decree. The principal point made by appellant seems to be that it does not appear that the contract of September 10, 1881, upon which the decree is predicated, was introduced in evidence. Under the circumstances of the particular case, it was not incumbent upon Ferry to offer the written agreement of that date in evidence. In no case, either at law or in chancery, is a party required to prove facts, alleged in his pleadings, which are admitted by the pleadings of the opposite party. Pankey v. Raum, 51 Ill. 88. Here the existence, execution, and contents of the agreement of September 10, 1881, fully apears in the pleadings of both parties. Said written agreement is set out as an exhibit to Ferry's cross-bill, and is also set out and made an exhibit to the cross-bill of appellant; and by his answer filed on February 17, 1887, to the amended cross-bill of Ferry, appellant expressly admits that Ferry and he "entered into" said agreement; and in said answer he, for greater certainty, makes reference to the copy of said agreement which is attached to his (appellant's) original cross-bill. It

was unimportant, under the circumstances, that the execution of said agreement was not proven at the trial, and that the contract was not formally introduced in evidence. The claims set up by appellant in his pleadings were in regard to the legal construction of said agreement, and that said agreement was "contrary to public policy, and that Ferry should not be allowed to take advantage of its terms." The only facts, other than the execution, existence, and contents of the contract, which were involved in the findings made by the court or in the decree based thereon were that Ferry purchased 600 shares of stock in the tyre and spring works for $15,000; that appellant transferred to Ferry 500 shares of the 605 shares of his (appellant's) stock mentioned in said agreement; and that the $15,000, with interest at 8 per cent., had not been repaid to Ferry, as provided for in the agreement. The answer of appellant to the cross-bill of Ferry admitted the purchase by Ferry of the 600 shares of stock, and that appellant had delivered to Ferry a certificate for 500 other shares of his stock; and the cross-bill of appellant admitted the purchase by Ferry of the 600 shares of stock for $15,000; and the supplemental bill of appellant asked that Ferry "return and assign to your orator [appellant] the said 500 shares of stock in his possession, and claimed by him under said agreement." By the terms of the agreement, Ferry was to have the right to vote the 605 shares mentioned therein, and only 500 shares of which were in fact transferred to him, until the $15,000, with interest at 8 per cent., should be repaid. The repayment of the $15,000 would not be presumed, and such repayment would be an affirmative fact to be established by appellant. But, waiving this, it already appears from the admissions in appellant's answer to Ferry's cross-bill, and from the admissions in appellant's cross-bill, that said $15,000 has not been repaid, either by dividends upon stock or by sales of the 600 shares of stock or otherwise, and that Ferry is still the owner of said 600 shares. It may be, as is suggested by appellant in his reply brief,

that he in his pleadings denied the right of Ferry to vote the stock in question; contested his right to have any further stock issued; denied and challenged the validity of the contract on the ground of public policy; averred that he was the absolute owner of the stock, and that he alone had the right to vote the same; denied that Ferry had any right to the repayment of the $15,000; and asserted that the same was a part payment on stock, and was to be used in and about the business of the tyre and spring works, and was not to be repaid to Ferry. But all these claims of appellant are matters which involve only the legal validity of, and the construction to be placed upon, the written contract, and indicate clearly that the contentions of appellant in the trial court were in respect to matters of law, and admitted the facts upon which the decree of the Supreme Court was based. We find no substantial error in the record. The judgment of the Appellate Court is affirmed.

LOUGHBRIDGE v. NORTHWESTERN INS. CO.

180 Ill. 267.

(1899.)

Wilkin, J. Appellee filed its bill in the Circuit Court of Cook county to foreclose a real estate mortgage alleged to have been executed by C. E. and Gay Dorn to secure an indebtedness due it of $20,000, evidenced by their certain bond ;the bond and mortgage being made exhibits to the bill. Though not shown by the abstract (which is very imperfect), it is admitted the bill alleged that, subsequently to the recording of the mortgage, the mortgagors conveyed the premises to the appellant, and that they claimed an interest in the premises. A decree was entered in favor of complainant for the amount claimed in the bill, and this appellant appealed first to the Appellate Court, where the decree below was affirmed, and now prosecutes this appeal.

The bill alleges that $2,000 of the secured indebted-

ness was twice extended; that for a default in the payment of a part of that indebtedness the complainant, on April 14, 1897, declared the whole amount of said loan due and unpaid, and that there was at that time due $19,700, with interest from November 1, 1896, at 6 per cent. per annum; that by reason of the failure of the mortgagors and persons interested to pay taxes on the mortgaged premises, complainant, on April 26, 1897, advanced $253.92; that on May 7, 1897, it paid $250 for such insurance premiums, which sums, with 6 per cent. interest, should be added to the principal amount due, that it became necessary to procure a continuation of abstracts of title, and to incur further expenses in continuing abstracts, the amounts for which were also claimed. To the bill appellant filed his answer, in which he admits that he purchased the premises, as alleged, "and assumed and agreed to pay, as a part consideration therefor, all liens and incumbrances thereon, * * * and is now the legal owner of said premises, and admits that his interest in said premises is subject to the lien of complainant's said mortgage; * * * that both G. Dorn and C. E. Dorn are, with this affiant, personally liable to pay to complainant its said claim, amounting to $19,700, and interest and costs; * * * that this defendant stands ready and willing to pay the entire amount of said mortgage and interest to date." Other allegations of the bill are neither admitted nor denied, but full proof is required. It was provided in the mortgage that the mortgagors should keep the premises insured for $20,000, and pay the taxes annually, and deliver to complainant, on or before May 1st, yearly, duplicate receipts for such payments, and that, in case of failure to make such insurance or to pay such taxes, the mortgagee might insure the premises and pay the taxes, the amounts so paid, with interest and expenses, to be added to the principal; that, in default of any of the covenants in the mortgage, the mortgagee might declare the whole amount due, and foreclose for the same. It is also agreed in the mortgage that, in case of foreclosure, the Dorns should pay for continuing

abstracts of title for the purpose of foreclosing, and reasonable solicitor's fees. The only grounds of reversal here urged are: First, that there is a variance between the allegations of the bill, proof, and the decree; second, that the court erred in entering the decree for the tax payment of $253.92 and interest thereon, and also for insurance paid, $250, and interest thereon, and also for the $48 and $7 for continuation of abstract.

On the first point a long list of authorities is cited as sustaining the proposition that, in a chancery proceeding, the bill, testimony, and decree must correspond, and that the decree cannot go beyond these; that where the answer discloses other grounds of relief, the complainant, to avail of such relief, must amend his bill. Generally speaking, no one will deny this proposition; but the argument of counsel fails to show wherein there has been a substantial violation of the rule. It is said there is no proof whatever of the alleged extension upon the $2,000 indebtedness. As shown, the bill, after that allegation, states that the whole amount due upon the mortgage was $19,700, and that allegation is expressly admitted by the answer. Where a fact is alleged in a bill and admitted in the answer, the admission is conclusive, and evidence to establish it is wholly unnecessary. Neither can evidence be heard to dispute it. Insurance Co. v. Myer, 93 Ill. 271, and authorities cited. It is wholly immaterial whether the answer making the admission be sworn to or not. Daub v. Englebach, 109 Ill. 267. In view of this allegation and admission by the answer, whether there was an extension of the $2,000 is wholly immaterial.

The first contention on the second point is that the appellant had until May 1, 1897, to pay the tax allowed by the decree, and that, inasmuch as complainant paid it before that time (April 28th), it could not recover. This position is based upon an assumption in direct conflict with § 177 of chap. 120 of the Revised Statutes, which provides that "all real estate upon which taxes remain due and unpaid on the 10th day of March annually, * * * shall be deemed delin-

quent." As to money paid for insurance and for extension of the abstract of title, we deem it only necessary to say that the payments were provided for by the mortgage and proven by the evidence

Other grounds of reversal seem to have been urged in the Appellate Court, but are not insisted upon here, and, if they were, could not be sustained. There is no substantial error in this record. The cause was properly disposed of by the Appellate Court, and its judgment will be affirmed.

Judgment affirmed.

MAHER v. BULL,

39 Ill. 531.

(1864.)

Mr. Justice Beckwith delivered the opinion of the court.

The appellee's testator filed a bill in equity against the appellant and Edward Kelly to dissolve a co-partnership between them, and wind up its affairs. A joint and several answer under oath was filed by the defendants, to which there was a replication. The defendants filed a cross-bill, alleging a violation of the articles of co-partnership by the complainant, from which they had sustained damages, and praying for their allowance. An answer was filed to the cross-bill, to which there was also a replication. Subsequently the appellant made an application to file a further answer, which was granted, and, as the record states, subject to objection and to such disposition as the court might make of it at the final hearing. The final decree directs the further answer of the appellant to be stricken from the files, and we presume that this was done for the reason that the court was of the opinion that he was not entitled to relief from the admissions of his former answer. Where an answer is not under oath, and a further answer is necessary to present a defendant's case, it is always allowed upon application made in apt time, so that the com-

plainant is not surprised or delayed in the progress of the cause, nor injustice is done him thereby.

The original answer, until it is otherwise ordered, always remains a part of the record, and, while it so remains, the defendant is bound by its admissions, and a retraction of them in a supplemental answer is of no more use than so much waste paper. The court never allows its records to be incumbered with useless papers. If an admission has been made in an answer improvidently and by mistake, the court will relieve the party making it from its effect, by an order directing so much of the answer as contains the admission to be treated as no part of the record, but, before such an order will be made, the court must be satisfied by affidavit that the admission was made under a misapprehension or by mistake. Courts exercise a liberal discretion in relieving from the effect of admissions in answers not under oath, which are mere pleadings and are frequently signed by counsel; but where an answer is under oath great caution is observed. If the relief sought is from an admission of law it may be sufficient to show that he was erroneously advised by his solicitor in that regard; but where the relief sought is from an admission of fact it should be shown that the answer was drawn with care and attention, stating upon information and belief such facts as were not within the defendant's own knowledge. No court ought to relieve a party from the consequences of a reckless misstatement under oath. It should also be shown that the fact misstated was not one within the defendant's own knowledge, and that he was erroneously informed in regard to it, and made oath to the answer, honestly believing such erroneous information. The affidavit of the appellant was entirely insufficient to relieve him from the effect of admissions in his original answer, and his application to file a supplemental answer for that purpose was properly denied.

An order was made, during the progress of the cause, requiring the defendants to close their proofs by a day named, which was afterward enlarged, upon their

motion. At the hearing the appellant offered to sustain the allegations of his answer and cross-bill by the testimony of witnesses to be examined in open court; but he was not allowed to examine them, because the rule for closing proofs had expired. Under the act of February 12, 1849, parties have the right to sustain every material allegation of their pleadings by an examination of witnesses in open court, and no order can be made abridging the rights of parties under it, or requiring them to waive or forego the rights thus secured to them. The proper practice is to set the cause for a hearing, and if afterward justice or convenience require further delay the hearing may be postponed, from time to time, until the court, in its discretion, directs the parties to proceed therein. Every reasonable indulgence should be granted to parties to enable them to procure their testimony; and, after it has been done, if they are not prepared at the hearing, they should justly suffer the consequences of their own neglect. It was suggested, in argument, that the testimony offered by the appellant was only cumulative. If it so appeared by the record, and the testimony had been excluded for that reason, the case would merit a different consideration. According to the record, the parties were not heard, as they were entitled to be; and, without any examination of the merits of the case, the decree of the court below will be reversed, and the cause remanded for further proceedings.

Decree reversed.

DERBY v. GAGE,

38 Ill. 27.

Mr. Justice Lawrence delivered the opinion of the court.

This was a bill in chancery, filed by the appellees against the appellants for the settlement of a partnership account. The case was heard on bill and answer, and the court decreed the defendant, Derby, to

pay the complainants, Gage and Tucker, $5,500, the sum originally invested by them.

The bill alleges a partnership, for the purpose of buying cotton, to have been formed between the complainants, the defendant Derby, and several other persons, to which various sums were contributed by the different parties. From the answer it appears that the entire capital and business were under the control of the defendant Derby—that the venture for the purchase of cotton resulted in no profits, but in saving about the capital invested—that two of the partners then retired and others were received into the concern—that the complainants allowed their $5,500 [*29] to remain, and that the capital and business remained as before, under the control of Derby. He took a boat load of goods to Vicksburg, with a view of selling them and buying cotton. He says in his answer that he sold the greater part of the goods, but was not permitted to buy cotton, and returned with the unsold goods, which are now stored in Chicago. He admits that he has paid two of the partners the amount invested by them, thinking there would be no loss, but he thinks nothing will be made, and that if he charges his expenses, which he claims the right to do, there will be a loss of about $400. He says, however, he is willing to pay the complainants the amount invested by them, if they will allow him $2,480, which he claims to be due from them to him on a transaction not having the most remote connection with this partnership.

We are inclined to the opinion, judging from the general spirit and character of this answer, that no great injustice has been done by this decree. At the same time we cannot affirm it without disregarding the settled rules of chancery practice, which the appellant has a right to and does invoke. The decree proceeds on the ground, and indeed recites, that Derby admits the possession of $5,500 belonging equitably to complainants. This is an error. He says the goods are not all sold, though he admits the greater part of them are, and says the residue are still in store

at Chicago. There is nowhere in his answer an admission that he has in his hands either $5,500, or any other specific sum, belonging to complainants. The answer is evasive, and the complainants should have excepted to it and compelled a specific statement of the amount of goods sold and unsold, or have filed a replication, and taken proof on these points. But the case having been heard on bill and answer, the latter must be taken as true, and all that it contains in support of complainants' case is the admission that the defendant has sold the larger part of the goods. This is altogether too indefinite to form the basis of a decree. The fact that he has paid two of the partners their capital invested must be taken with [*30] the explanation given in the answer, that he did so under the belief that on the sale of the unsold goods there would be no loss. This, however, does not bind him to anticipate the sale of the goods in settling with the other partners.

The claim of set-off, made in the answer, is inadmissible. It could, in any event, only be heard upon a cross-bill, and a cross-bill should not be permitted to be filed for that purpose unless it is shown to the court by affidavit that the complainants are in such pecuniary circumstances that the alleged claim is likely to be lost unless allowed to be set off. As already stated, the claim has not the slightest connection with the subject-matter of this suit, and is for unliquidated damages.

The complainants will have leave to except to the answer, or to file a replication and take proof. If, however, all the facts stated in the answer are true, it would appear that there are partners who have not been made parties to the bill, in which event the complainants must amend. It is evident from the answer that there is some sum coming to complainants from the defendant Derby, and when this sum is ascertained, the court will give a decree for the amount and for interest upon it from the time when complainants demanded payment.

Decree reversed.

SCHNADT v. DAVIS,

185 Ill. 476.

(1900.)

Mr. Justice Boggs delivered the opinion of the court.

Section 39 of chapter 22 of the Revised Statutes, entitled "Chancery," provides a cause may be referred to the master in chancery to take and report the evidence with or without his conclusions thereupon. In the case at bar the cause was referred to the master to take the proof in the cause and report the same, together with his "opinion of the law and the evidence." It was the duty of the master, under this order of reference, to cause the witnesses to be brought before him and examined, to have their testimony reduced to writing and to embody such testimony in his report, together with his conclusions as to the facts established by the testimony and his opinion as to the rights of the parties under the law applicable to that state of facts. "The document exhibiting the referee's or master's findings and conclusions is called his report, the object of which is to show the proceedings which have been had under the order of reference, the evidence which has been taken, and the findings and conclusions reached by the master or referee, according to the terms of the order of reference, in such a manner that intelligent action may be had thereon by the court." (17 Ency. of Pl. & Pr. 1033.) In Hayes v. Hammond, 162 Ill. 133, we said (p. 135): "In the absence of any statute the master did not report the evidence to the court, and it was necessary for the parties to apply to him for certified copies of such evidence as they might require, relating to matters excepted to; but by our statute the whole of the evidence is reported to the court, and the parties may select from it such portions as are relevant to the exceptions and present them to the court." In Ronan v. Bluhm, 173 Ill. 277, we said (p. 284): "The cause having been referred to the master to take and report the proofs and his conclusions on points of law and

fact, the proofs taken by the master should have been submitted with his report."

The master to whom this case was referred holds his office by virtue of appointment thereto under the provisions of section 1 of chapter 90 of the Revised Statutes, entitled "Masters in Chancery." Section 9 of said chapter 90 reads as follows: "Masters in chancery shall receive for their services such compensation as shall be allowed by law, to be taxed as other costs." Section 20 of chapter 53 of our statutes, entitled "Fees and Salaries" (Hurd's Stat. 1897, p. 830), fixes the compensation to be allowed to be charged and collected by masters for their services. Said section 20, so far as it relates to services rendered by the master in this instance, is as follows:

"*Masters in Chancery.*—Sec. 20.—Fees of. * * * For taking depositions and certifying, for every one hundred words, fifteen cents. For taking and reporting testimony under order of court, the same fees as for taking depositions. * * * For examining questions of law and fact in issue by the pleadings, and reporting conclusions, whenever specially ordered by the court, a sum not exceeding ten dollars. * * * And no other fee or allowance whatever shall be made for services by masters in chancery. In counties of the third class, masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, such compensation as the court may deem just, and for services not enumerated above in this section, and which have been and may be imposed by statute or special order, they may receive such fee as the court may allow."

The fees which masters are entitled to charge for official services in the matter of taking and reporting the evidence are enumerated in section 20. The concluding portion of the section, which relates to the fees of masters in the county of Cook, that county being of the third class, changes the provision of the preceding portions of the section relating to the fees to be allowed for examining questions in issue referred to them and reporting conclusions, but in no respect affects the provisions fixing the fees for taking

and reporting testimony. The fees for taking and reporting testimony are the same in each of the counties of the state, viz., fifteen cents per hundred words. Said section 20 expressly prohibits the allowance to masters of any fee or allowance not provided for in the section. The fees which an incumbent of the office of master in chancery may lawfully exact depend upon the terms of the statute, and the rule is that such statutes are to be strictly construed. (4 Am. & Eng. Ency. of Law, 314.) "Neither court, jury nor referees can award costs unless authorized by law, and where the rule is fixed by statute it must be followed strictly." (4 Am. & Eng. Ency. of Law, 315.) "It may be safely asserted as a legal proposition, that fees or costs cannot be allowed or recovered unless fixed by law. * * * A witness or officer of the law has no legal right to recover on a *quantum meruit* for services rendered under the requirements of the law. For such services he is limited to the fee or compensation fixed by the statute." Smith v. McLaughlin, 77 Ill. 596.

If a master deems it desirable to have the services of a stenographer to enable him to perform the duty of taking or reporting the evidence, the services rendered by the stenographer are to the master, and the stenographer must look to the master—not the parties, or either of them—for his compensation. The compensation of the master fixed by the statute for taking and reporting testimony is fifteen cents per hundred words, and no more can be legally demanded of the parties, or either of them, for or on account of such services. Nor has the court power to order the payment of a greater sum or allowance for such service, or to order the parties, or either of them, to pay any sum to a stenographer for assisting the master in taking and reporting the proof. If the court had been clothed with power to order the appellants to procure a transcript of the evidence from the stenographer, there would be force in the contention the amount to be received by the stenographer should have been fixed in the order—that the appellants should not have been left wholly in the power of the stenographer as to

the amount to be paid. The sense of justice is not always strong enough to moderate and restrain the desire for gain. But the stenographer is not an officer of the court, had no legal connection with the court, the master or the case. The law has not fixed his compensation or authorized the court to do so, and the order in its entirety must be reversed.

Counsel for appellee says: "The practice before the master uniformly contemplates the reduction of the testimony to writing by a stenographer. The stenographers do not work for nothing. When a party to litigation calls witnesses and examines them at length, with knowledge that their testimony is to be taken by the stenographer, he must expect that before a master can consider the evidence it shall be presented to him in writing. * * * The master cannot make up his report until the evidence is before him in written form." The duty of a master is to have the witness brought before him and examined in his presence. The testimony of the witnesses is presented to the master orally, and is thus before him for consideration. His duty is to reduce it to writing, or have it so reduced to writing, and report it to the court. It would seem from the statements of counsel for appellee it has become the practice of masters in Cook county to commit the duty of hearing the witnesses testify to a stenographer—not in the presence and hearing of the master—and of requiring the parties to produce a transcript of the testimony so taken for the consideration of the master, in order he may thereby be informed as to what has been testified to, and consider and weigh the testimony as disclosed by the transcript, and make his findings from such transcript and use such transcript for his report of the testimony, and that the practice further is to impose upon suitors the burden of compensating the stenographer for doing work which it is the duty of the master to do, and for which the master also collects the full allowance authorized by the statute to be paid for such service. If such practice has obtained it should no longer be tolerated. When the order of reference requires no more

than that the master shall take and report the evidence, the evil of the practice is the illegal exaction of the sum of money demanded from suitors as for the compensation of the stenographer, which, if not submitted to, shall, as counsel for appellee contends, be enforced by the denial of a hearing in the courts.

But the practice is fraught with another and not less serious evil when indulged in a case where, as here, the order of reference requires the master shall also make report of his conclusions of law and fact. In order to discharge the duty of arriving at conclusions as to the facts, the master should see the witnesses and hear them testify. In 17 Ency. of Pl. & Pr. 1028, it is said: "One of the most important duties and powers of the referee is to hear the parties and such evidence as may be presented bearing upon the issues involved."

The order entered by the court, on motion of the appellee, that the master should not consider the testimony which had been taken before him in behalf of the appellants unless the appellants should procure and submit to the master a stenographer's transcript of the said testimony, should not have been entered, but the motion should have been denied. The action of the master in considering only the testimony of the appellee and forming his conclusions therefrom should not have been approved by the court, but the objections and exceptions in that respect presented to the report should have been sustained. It was the right of the master to demand compensation for taking and reporting the proof at the statutory rate of fifteen cents per hundred words. For examining the questions of law and fact and reporting his conclusions thereon the master was entitled to such compensation as the court should deem just—that is, such amount as the court, upon consideration of such services, should judicially determine to be just and reasonable and should order to be paid. The master cannot arbitrarily fix upon an amount to be paid him as his compensation for examining questions of fact and reporting his conclusions, but before he is entitled to demand the parties, or either of them, shall compensate him in any

sum for such services, it is his duty to have the court determine the amount he is justly entitled to receive for such services. In the determination of that question the parties are entitled to be heard. The hearing should be had after the master has considered the evidence, made his finding of law and fact and completed his report, so that it is ready to be filed on payment of the amount the court finds should be paid for such services, for the reason an inspection of the report is necessary to enable the court to ascertain and determine as to the just compensation to be paid the master and by whom it shall be paid. The course is desirable for the further reason, before the master has acted he is, in a sense, clothed with power to declare judgment on the rights and interests of the parties, and their condition and relation to the master is such they should not then be required to accede to or contest his demands for services to be rendered in the matter of deciding for or against them. The report in this case as to the fees and charges of the master is as follows: "Master's fee this report, $50." This mode of reporting fees and charges can be easily made a cover for illegal and oppressive exactions. An itemized statement of services rendered, and the fees allowed therefor by the statute, should be made, and if services are rendered for which the fees are not fixed by the statute, but are left to be determined by the chancellor, the report should state such service and the action of the court in the matter of the master's compensation therefor, and also should show whether such costs had been paid, and if paid, by whom.

It is urged it does not appear from the record, otherwise than from the statements in the exceptions to the report of the master, that the witnesses named in such exceptions gave testimony before the master, or that the master did not consider all the testimony produced by the appellants on the hearing before the master. The court, on motion of the appellee, ordered that the appellants should, on or before a day named, submit to the master a stenographer's transcript of the evidence taken on behalf of said appellants and that in

default of compliance with such order the master should make up and return his report upon the evidence appearing from transcripts of stenographer's notes submitted to him. This order clearly established that the testimony of witnesses produced by appellants had been heard and taken down in shorthand. The master's report contains no testimony taken on behalf of appellants. The certificate attached by the master to his report states, in express terms, the report contained all the evidence "submitted" to him and on which he acted, and that such evidence was that, only, which had been produced by and on behalf of appellee. That the master did not regard the testimony of witnesses taken under the order of reference, but not transcribed into longhand, as "submitted" and that he excluded such testimony from his report and from consideration, is too clear to admit of doubt or require discussion.

It is urged that the exceptions to the action and report of the master should have been supported by a showing of the testimony on behalf of the appellants which the exceptions allege was erroneously excluded from the report. This testimony had been produced before the master. It was the duty of the master to have embraced it within his report as a proper part of the record of the cause. It was omitted from the report and excluded from consideration under authority of an order which the appellee procured to be improperly entered. It was enough for the appellants to show that the master had thus omitted the testimony produced in their behalf. On such showing the report should have been disapproved and the master ordered to make report of the testimony produced before him.

The judgment of the Appellate Court and the decree of the Circuit Court are each reversed, and the cause will be remanded to the Circuit Court, with directions to deny the motion entered by appellee to require the appellants to procure and submit to the master transcripts of the testimony produced before the master by the appellants, and to take such further

proceedings in the cause as to justice and equity shall appertain.

Reversed and remanded, with directions.

COX v. PIERCE,

120 Ill. 556.

(1887.)

Scholfield, J. A full statement of this case will be found in 22 Ill. App. 43, and we entirely concur in the conclusion there reached, and in all that is there said on the questions of fact.

We deem it necessary to notice here only one question of law discussed in the arguments of counsel. The bill is for an account of partnership dealings. Answer was filed putting in issue the material allegations of the bill, and to this there was filed a replication. The court afterwards referred the cause to the master in chancery to take the evidence and report it to the court, and thereafter the court further ordered that the master in chancery, "on concluding the taking of testimony, state the account between the said parties, and report the same, with the evidence taken by him," to the court. The master in chancery proceeded, in compliance with this order, to take the testimony, and state the account between the parties, and he prepared a report thereof, which he submitted to the respective parties. The present appellant filed exceptions to the report, which the master disallowed. The report, together with the evidence taken, and appellant's exceptions to the report, were then filed in the Circuit Court. By agreement of parties entered of record, the chancellor heard the case upon the report, exceptions, etc., and accompanying evidence in vacation, and then sustained the exceptions, and decreed that the cause be again referred to the master, and that he restate the account. In obedience to this order the master restated the account, and made a report thereof to the respective parties, and the appellant filed exceptions to this report also, but the master disallowed them.

This report, and the exceptions thereto, and the evidence taken, were afterwards filed in the Circuit Court, and appellant there renewed his exceptions to the master's report, but they were overruled by the court. And thereupon appellant, after identifying certain books as the account books of the firm, offered to read them in evidence, but the court refused to allow them to be so read. Appellant then offered to prove by oral evidence facts tending to show that the accounts, as stated by the master, was not correctly stated, but the court likewise refused to allow this proof to be made; and thereupon decree was rendered, in conformity with the master's report, in favor of appellee.

Prior to the act of February 12, 1849, (Scates, Comp. 166,) oral evidence was not heard in chancery cases, but all evidence was presented by depositions. That act, however, provided that, "on the trial of any suit in chancery, the evidence on the part of either plaintiff or defendant may be given orally." And in Owens v. Ranstead, 22 Ill. 161, it was held that the court cannot deprive parties of their rights, under the statute, to introduce oral evidence, by a rule of court excluding it unless ten days' previous notice of the intention to offer such evidence shall be given. And in Maher v. Bull, 39 Ill. 531, it was held that the court cannot by an order to close proofs by a particular time, prevent a party from giving oral evidence, under this statute, on the hearing. Neither case, however, it will be noticed, has any relevancy to a hearing before a master in chancery, and when they were decided there was no statutory provision authorizing a reference to a master in chancery. Since these cases were decided, our legislature, by an act approved March 15, 1872, (2 Gross, St. 1873, p. 35, § 39,) has enacted: "The court may, upon default or upon issue being joined, refer to the cause to a master in chancery, or special commissioners, to take and report evidence, with or without his conclusions thereupon." See, also, note at bottom of page 36, *id.* This section is reproduced literally as section 39 of chapter 22, entitled "Chancery," in the Revision of 1874. And the substance of the act

of February 12, 1849, is reproduced in that revision as section 38 of chapter 51, entitled "Evidence and Depositions," in these words: "On the trial of every suit in chancery, oral testimony shall be taken when desired by either party." These sections must, then, be construed as parts of a single system, and so as to give effect to both. We cannot suppose that the legislature intended to confer upon the Circuit Courts so useless a power as that of referring causes to masters in chancery to take and report the evidence, together with their conclusions thereon, when such evidence and report might be entirely disregarded by either party, and the court be required to again listen to all the evidence detailed orally by witnesses. The words "the evidence in the case" unquestionably mean all the evidence in the case; and the only purpose in allowing it to be referred to the master to take it and report it, with or without his conclusions therein, to the court, is to lighten, to that extent, the labors of the court. It must therefore have been intended that oral evidence, instead of depositions, shall be taken on the trial of every suit in chancery, when desired by either party; but when it is referred to the master to take and report the evidence in the case, and his conclusions thereon, all the evidence, whether in depositions or documents, or to be detailed by the mouths of living witnesses, must be introduced before him; and when thus introduced, and afterwards properly reported by the master to the court, it is, in the language of section 38, *c.* 51, *supra*, "taken on the trial." And, on the assumpsit that this is the correct construction of the sections, we held, in Prince v. Cutler, 69 Ill. 267, that, upon hearing exceptions to the master's report, it is not competent to hear any evidence that was not before the master when he made his report. See page 272. If the evidence offered was not admissible upon the question of confirming the report, it cannot be admissible to contradict it; for to allow it for that purpose would be only to do indirectly what is not allowed to be done directly.

The ruling was right. The judgment of the Appellate Court is affirmed.

BLAIR v. READING,

99 Ill. 600.

(1881.)

Mr. Justice Mulkley delivered the opinion of the court.

Quite a number of objections are urged against the propriety, regularity and legality of the decree in this case; but it is claimed, as to most of them, the assignment of errors in the Appellate Court is not sufficiently broad to cover them. The tenth assignment of error in that court questions the justness and legality of the record and proceedings in the Circuit Court generally, and we are of opinion it is sufficiently definite to present for our consideration all the objections urged against the decree and proceedings in that court. As the decree will have to be reversed for errors manifest on the face of it, we do not deem it proper to enter upon a discussion of the evidence, or to express any opinion upon the merits of the controversy, so that upon a rehearing the efforts of the court and parties to arrive at a just and proper conclusion upon the real merits of the controversy may not be embarrassed by anything we may here say.

The circumstances under which this case was tried, in our judgment, afford sufficient ground for remanding the cause for a rehearing, if there were no other reasons for doing so.

After the issues were made up, and the cause was standing for a hearing upon the proofs already taken and reported by a special master, the parties mutually agreed that the cause might be heard by the judge at chambers in vacation. Now, it is very clear that the judge at such a hearing could exercise no judicial function. He could not, therefore, make any order in the case which would be binding upon the parties, as a judicial act or otherwise, against their assent, which was not strictly in pursuance of their agreement, if at all. It therefore follows, the judge upon the hearing at chambers had no power to entertain an application

to dismiss complainant's bill as to Reading, and *a fortiori* had no power or authority to require Blair to answer Reading's cross-bill, or to pass upon the sufficiency of the answer which he had filed under protest; and least of all had he any authority to pronounce a decree *pro confesso* against Blair, on his failure to further answer said cross-bill, in obedience to a rule to answer *instanter,* which he had no power to enter.

It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation, except such as are expressly authorized by statute. The legislature has provided that the judges of circuit courts and the Superior Court of Cook county may, upon due notice, entertain motions in vacation to dissolve injunctions, permit amendments of pleadings, etc., and they may also enter judgments in causes which have been taken under advisement; but these provisions have no application to the case in hand.

The agreement to a hearing in vacation was voluntary, and could not, in any view, become binding upon the parties, except so far as it was executed with their assent, and in strict conformity with its terms. Whether, if the judge had heard the cause upon the evidence and pleadings as they stood at the time the agreement was entered into, and the parties had appeared and participated in the hearing without objection, and a decree had subsequently been entered up in term time, in pursuance of such hearing, the parties under such circumstances would be estopped from questioning the regularity of the proceedings, is a question which is not presented by this record, and about which we do not feel called upon to express any opinion. Whatever might be the rule in such a case as that, cannot affect the result in this case. The parties, in entering into the agreement in question, must be presumed to have known that the judge, in vacation, would be powerless to enter any orders which would in any manner change the *status* of the case, and that no such power could be conferred upon him by the mere agreement of the parties.

It is, therefore, but reasonable to assume that the parties, by entering into this agreement, intended to bind themselves to nothing further than that the case should be heard by the judge at the time and place specified, upon the issues as then made up, and such evidence as had already been taken and might be produced at the hearing, and that the conclusion reached by the judge upon such hearing might subsequently be entered by the court as the decree in the cause, subject to such exceptions as the parties might see proper to make to the same. But the judge who presided at the hearing seems to have taken a different view of the matter. He clearly acted upon the legal hypothesis that he was clothed with judicial powers to the same extent as if court had been in session. This, as we have already seen, was a misapprehension of the law. Indeed, it is conceded by counsel on both sides, that all orders made by the judge at the hearing were without any authority of law, and therefore void, and upon this very ground the decree is sought to be justified by defendants in error. It is argued that inasmuch as all the proceedings before the judge in vacation were unauthorized and void, this court must disregard them altogether, just as though they had never taken place, and look only to the decree as finally entered by the court. While this position at first view may seem plausible, yet there are several fatal objections to it. In the first place, it appears, from the recitals of the decree itself, that it is based upon the hearing in vacation, and not upon any trial or hearing in court, and if that hearing is to be disregarded altogether, then the decree was simply entered up without any hearing at all, for it is manifest there never was any other hearing except the one in vacation, and to render a decree without any hearing or submission at all would clearly be error.

Again, the decree further shows that the hearing was had upon, among other things, the cross-bill of Reading, to which no answer was filed by Blair except the one in vacation; and as no rule to answer was ever

entered against him, except that which was entered in vacation, it follows, upon the theory assumed, that the decree upon the Reading cross-bill was rendered, in contemplation of law, without any answer, or even a rule to answer, for the record shows no other rule except that in vacation was ever entered against him requiring an answer, and to enter a decree on a cross-bill without either an answer or rule to answer, would clearly be error. Assuming, then, that the proceedings before the judge were irregular and invalid, it follows that any decree founded upon them would of necessity be erroneous. While we regard the orders of the judge, with respect to the cross-bill and answer thereto, as without authority, and therefore void, yet it does not follow that the cross-bill and answer, when filed in court in the cause, were also void. When properly entitled and filed they became pleadings in the cause, notwithstanding error may have intervened in the manner in which they became a part of the files. Let it, therefore, be admitted that while the orders of the judge in vacation are to be regarded as mere nullities, yet as the cross-bill of Reading, and answer thereto, were filed before the decree was entered, they became upon such filing proper pleadings in the cause, and the court, in rendering its decree, had the right to act upon them, although the answer was filed under protest and in obedience to a rule which the judge had no power to make. Still, we are of opinion the decree upon the Reading cross-bill is erroneous; for in that view of the case it would have been the duty of the court, on discovering the cross-bill and answer on file, to have set the case down for a hearing, at least as to the cross-bill, which was not done. Moreover, assuming this view of the law to be correct, it would follow, if Blair had the right, under the law, to dismiss his bill as to Reading at the time of his application to do so, his written motion filed for that purpose having been made the day before the filing of the cross-bill, had the effect of defeating altogether the right to file the cross-bill. The motion to dismiss being first in time, had precedence of the motion to file the cross-

bill, and should have been disposed of first, according to the rights of the parties as they appeared when the motion was made.

It is laid down in Daniell's Chancery Practice, without any modification, that a complainant has the right, at any time before hearing, to dismiss his bill at his own costs, either as to a part or all of the defendants, and this, in the absence of any statutory provisions on the subject, is unquestionably the correct rule. 2 Daniell's Ch. P. 927; Dixon v. Parks, 1 Ves. Jr. 402; Curtice v. Lloyd, 4 Mylne & Craig, 194.

Our statute, however, has provided, that "no complainant shall be allowed to dismiss his bill after a cross-bill has been filed, without the consent of the defendant," and it is claimed by defendants in error, that inasmuch as Ray had filed a cross-bill before Blair's application to dismiss as to Reading, the latter, who had filed none at that time, can avail himself of the fact that Ray had, in order to defeat Blair's right to dismiss as to Reading.

The manifest object of the legislature in adopting this provision was to enable any defendant in chancery who might have some equitable right or cause of action against the complainant, growing out of and connected with the matters set up in the complainant's bill, to have all matters of difference connected with the subject matter of litigation fully and finally disposed of at the same time, or at least in the same suit. It certainly could not have been intended, where the parties are numerous and the plaintiff discovers he has improperly joined some of them in the bill, to deprive him of the right of dismissing as to them, merely because one or more of the others have filed a cross-bill, in which the unnecessary parties have not joined or deemed the matter in controversy of sufficient importance to file one on their own account. Is the complainant bound to keep these parties in court, thereby increasing the costs and expenses of the litigation, merely because some of their co-defendants happen to want to litigate matters in which these unnecessary parties have no concern, and the others pos-

sibly withhold their assent to a dismissal merely for the sake of harassing and punishing the complainant? We think not. We are of opinion that no one can avail himself of the statute unless he has, either by himself or in connection with other defendants, filed a cross-bill before the application to dismiss is made. It follows, therefore, that the pendency of Ray's cross-bill to which Reading was not a party complainant, presented no reason why Blair's bill should not have been dismissed. This being so, whether the proceedings in vacation be regarded void or valid, the decree, so far as it is based upon Reading's cross-bill, is erroneous.

The decree upon the cross-bill of Ray is also erroneous in several respects. The decree, after declaring the injunctions in the two replevin suits, and in the action of assumpsit, in which the judgment for $2,569.20 had been confessed, dissolved, and after reciting the fact that said judgment had been opened and leave granted to plea to the merits, proceeds in these words: "And in said case of Lyman B. Ray v. Novel Blair, in assumpsit, said motion to open and for leave to plead are ordered to be vacated and set aside, *and said* judgment for said sum of $2,574, entered May 25, 1875, confirmed; and it is further ordered that said case of Novel Blair against Ray, Reading and Schroder in replevin, be dismissed out of court, with the customary order for the return of the property replevied."

While a court of chancery, under a proper state of facts, may restrain parties from prosecuting a suit at law, and may declare, for sufficient reasons, such suit and all proceedings under it null and void, yet we are aware of no principle that authorizes it to otherwise assume control over such proceedings by directing this or that step shall be taken in the case, as was done in the present case. Whether the property replevied should be returned or not, was a question for the exclusive determination of the court of law in which the case was pending. Courts of equity can control proceedings at law only by acting upon the

parties, or by annulling their proceedings when consummated. They have no right to sit as a court of error for the purpose of reviewing their proceedings, or of directing what steps shall be taken in them. Courts of law of general jurisdiction have the same control over their proceedings as courts of equity have over theirs, subject to the limitation already stated, and any decree which assumes to exercise such power or jurisdiction over them is erroneous.

Again the decree directs, "that in case of default by said Blair in making such return of the property, the coroner of Grundy county, upon being presented with a certified copy of this decree, seize the said property, if found within his county, and return the the same to said Ray, and make due return of his acts in that regard to this court," etc. This provision of the decree is clearly erroneous. The coroner of Grundy county not being a party to the suit, as an individual was not subject to the orders or direction of the court. As an officer he was not authorized to exercise any power or authority over the property replevied, except in obedience to legal process placed in his hands for that purpose, and a certified copy of the decree is in no sense legal process, within the meaning of the constitution. By the provisions of that instrument all process must run in the name of the People of the State of Illinois, and a mere certified copy of the decree would not meet this requirement of the constitution. We fully recognize the power of a court of equity, where it has obtained jurisdiction over property in litigation, to appoint a receiver or other custodian of such property, and clothe him with such power and authority as may be necessary for the management and preservation of the same; but that is not the case here, and the principle has no application to the facts of this case.

There are other errors of a similar character appearing upon the face of the decree, but we will not consume further time by considering them, as what we have already said is deemed sufficient to present our views upon this subject.

We are also of opinion the assessment of damages, on account of suing out the injunction, is not warranted by the circumstances in this case. The only element of damages which entered into the allowance made by the court, was that of solicitor's fees. The whole amount in controversy was, as shown by the decree, a fraction over $2,400, and the court assessed the damages at $600. The propriety of suing out the injunction was never called up or considered by the court until the case was finally considered on its merits. Hence the extra expense of a separate hearing of a motion to dissolve was not incurred, and upon an examination of the record and the general character of the evidence, it is manifest, that so far as any portion of the proofs was necessary or appropriate in obtaining a dissolution of the injunction, with the exception of that which was offered in proof of the damages, it was equally necessary and appropriate to establish the case of defendants in error, irrespective of the injunction. In short, we are of opinion the expenses incurred on account of solicitor's fees in the preparation of the case for a hearing, and in conducting the hearing, would, under the circumstances of this case, have been substantially the same as if no injunction had been sued out at all. At any rate, we are quite clear that the suing out of the injunction did not make a difference of $600,—something near one-fourth of the amount in controversy,—and it is only for the additional expense there should have been a recovery. Wilson v. Hæcker, 85 Ill. 349.

Without consuming further time in the consideration of other questions raised upon the argument, suffice it to say that outside of the errors already indicated, we are satisfied, upon a careful consideration of the record, the ends of justice will be subserved by a rehearing of the whole case; and in view of the fact that some of the pleadings seem to be, when considered in the light of the proofs, to some extent defective, the judgment of the Appellate Court will be reversed, and the cause remanded, with directions to

reverse the judgment of the Circuit Court and remand the cause for a rehearing, with leave to both parties to amend their pleadings and take additional testimony, if they shall be so advised.

Judgment reversed.

SHELDON, J., concurs in the conclusion.

JOHNSON v. F. & M. R. RY. CO.,

111 Ill. 417.

(1884.)

MR. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a proceeding commenced by petition, by the Freeport and Mississippi Railroad Company, to condemn, under the Eminent Domain act, the whole of lots 10, 11 and 12, in block 5, on the east side of the Galena river, in the city of Galena, that remains after taking therefrom a strip of land ten feet in width off the east end thereof, conveyed to the Illinois Central Railroad Company, and after taking therefrom another strip of ground off the west end thereof twenty-two feet wide, on Bouthillier street, and gradually narrowing southwardly to a width of ten feet on the southerly boundary line of said lot 10, conveyed to the city of Galena, the title whereof is conceded to be in fee in Ann Eliza Johnson. The purpose of the condemnation is for depot, station building, right of way for construction and operation of main and side-track, spurs, switches, etc.

At the return day of the writ, Ann Eliza Johnson filed her cross-petition in the proceeding, in which, among other things, she alleged that "she is the owner of a strip of ground off the west end of said lots 10, 11 and 12, of twenty-two feet, on Bouthillier street, narrowing southwardly to ten feet in front of lot 10, on Water street, in which the right of user was conveyed to the city of Galena, which strip is not included in the petition for condemnation; that in and by her deed conveying such right of user to the city

of Galena, which was dated January 25, 1856, it was stipulated that the conveyance was made on the condition that the grounds so conveyed should be forever kept and used as a public street and wharf for the use of the inhabitants of Galena, and that Water street, in front of said lots, should be kept and maintained at all times forty-five feet wide; that in consequence of the said condition on which said conveyance was executed, she has a vested interest in so much of said Water street as in front of said lots, paramount to other lot owners abutting on said street; that the petitioner, by the line of its contemplated railroad, will run over and appropriate to itself the exclusive use of said Water street in front of said lots, under and by authority of an ordinance of the city of Galena, which provides that said petitioner shall pay all damages occasioned thereby." The cross-petition concludes, "by means whereof she will be greatly injured and damaged in other property she is interested in, adjacent and within two hundred feet thereof, by reason of taking said Water street aforesaid, and prays that damages may be assessed under the law, as required by the statute," etc. On motion of the attorney for the petitioner, this cross-petition was stricken from the files. Afterwards, Ann Eliza Johnson filed a special plea to the petition, and this, on motion of the attorney for the petitioner, was also stricken from the files.

When the cause came on to be heard, the attorney for Ann Eliza Johnson challenged the array of jurors, and moved to dismiss the petition; but the challenge was disallowed, and the motion to dismiss was overruled. Her damages were then assessed, by the verdict of the jury, at $2,500, whereupon she moved for a new trial, but the court overruled the motion and entered judgment upon the verdict. Exceptions were taken by Ann Eliza Johnson to the various rulings of the court adverse to the contentions of her attorneys, which were allowed, and she now assigns numerous errors in consequence of such rulings. Such of

them as we deem important we shall notice in consecutive order.

First—We think the court erred in striking the cross-petition of Ann Eliza Johnson from the files. The constitution guarantees as well that private property shall not be damaged, as that it shall not be taken for public use without just compensation (sec. 13, art. 2, of the constitution), and this guaranty is repeated in the first section of the Eminent Domain act. The second section of that act likewise makes provision for assessing damages on account of property damaged, as well as on account of property taken for public use. Where some property is damaged and other property is taken for public use at the same time, in many instances it would seem to be almost indispensable to the ends of justice that the questions should be considered together, and hence there ought to be some way by which, if the petitioner neglect to include in his petition all property damaged as well as all property taken, it could be brought before the court. Obviously, the most convenient way to do this is by cross-petition. It is true the statute makes express provision for filing a cross-petition only by a person interested who is not made a defendant; but this, by implication, would seem to recognize the right of a person already made defendant, whose interests are not fully or accurately stated in the petition, to file a cross-petition for that purpose. It surely could never have been intended that a person whose name or interest is not mentioned in the petition may come in by cross-petition, describe his interest and have his rights adjudicated, and yet a person who is summoned as defendant shall be denied the privilege of being allowed to accurately describe his interest in a cross-petition and have his rights adjudicated. The right to file a cross-petition, by the analogies of the law, would seem to result as an incident from the right to file the petition, and so we have held that a cross-petition is an appropriate mode of bringing before the court property of the defendant taken or damaged and not described in the petition. Mix v. La-

fayette, Bloomington and Mississippi R. R. Co., 67 Ill. 319; Jones v. Chicago and Iowa R. R. Co., 68 *id.* 380; Galena and Southern Wisconsin R. R. Co. v. Birkbeck, 70 *id.* 208.

This cross-petition distinctly shows an ownership of the defendant, Ann Eliza Johnson, in the fee of certain soil theretofore conveyed to the city, adjacent to Water street,—an implied obligation on the part of the city to keep that street open in front of her property, forty-five feet wide; that the petitioner will run over and appropriate the exclusive use of that street in front of her property, and that she will be damaged thereby. There is, undoubtedly, an insufficient description of the property claimed to be damaged, and precisely how it will be damaged; but this can be remedied by amendment. Had the petitioner demurred to the cross-petition, instead of moving to strike it from the files, the demurrer should have been sustained; but then the party would have been allowed to amend, and might thus have brought before the court such a claim for damages as she would have been entitled to have adjudicated in this proceeding. The rule in equity is, a bill will not be dismissed, on motion, unless it be for want of equity apparent on the face of the bill, and where it is manifest no amendment could help it, or for want of jurisdiction; (Thomas, Trustee, v. Adams et al., 30 Ill. 37;) and at law, if a plea be insufficient in form or substance, the only mode of taking advantage of the defect is by demurrer. It is improper in such case to strike the plea from the files. Orne v. Cook, 31 Ill. 238.

Second—We have held in Smith v. Chicago and Western Indiana R. R. Co., 105 Ill. 511, that under the Eminent Domain act an answer is not allowable, and the principle includes a plea. The plea was therefore properly stricken from the files.

Third—The objections that inasmuch as the petition was filed in vacation, the cause could not be tried at a regular term, is untenable, and the challenge interposed to the array of jurors, and motion to dismiss the petition based on that objection, were properly dis-

allowed and overruled. We held in Bowman et al. v. Venice and Carondelet Ry. Co., 102 Ill. 468, *et seq.*, that a proceeding of this character, though commenced in vacation, may be tried, as was here done, in term time.

Fourth—We are unable to say whether the court properly rejected, as evidence, the deed from Lucy N. Wight to the city of Galena, and the deed from Lucy N. Wight to Ann Eliza Johnson, and ordinance of the city of Galena, as offered to be read by the attorney for Ann Eliza Johnson, because they are not set forth in the bill of exceptions or certificate of evidence. They may or may not have been properly excluded. This can only be determined by an inspection of their contents, and the burden is on the party alleging error to affirmatively show its existence.

Fifth—The objection that opinions of witnesses not shown to have been experts, were received in regard to the value of the property sought to be taken is not tenable. Persons who are familiar with the land, and have an opinion of its value, are competent to express that opinion. But the weight of such evidence presents a different question. On that point, where there is equal credibility, superior opportunity and intelligence would, of course, be entitled to the greater weight (White et al. v. Hermann, 51 Ill. 243; Keithsburg and Eastern R. R. Co. v. Henry, 79 Ill. 290.) Such opinions of witnesses are not to be passively received and blindly followed, but they are to be weighed by the jury, and judged of in view of all the evidence in the case and the jury's own general knowledge of affairs, and have only such consideration given to them as the jury may believe them entitled to receive. McReynolds et al. v. Burlington and Ohio River Ry. Co., 106 Ill. 152.

Sixth—On the trial there were offers by the defendant, Ann Eliza Johnson, to prove that the property sought to be condemned had a special value for railroad purposes beyond its general market value, and also that certain prices had been offered for the property, within a few months of the time of the trial, above

the general market value,—all of which, on objection, the court refused to allow to be proved; and, consistently with such ruling, the court, among other things, at the instance of the petitioner, instructed the jury:

"The jury are instructed by the court, that the evidence of certain witnesses as to what they would give for the property in controversy, is not proper evidence for the jury to consider in making up their verdict in this case, that such testimony was ruled out by the court, and should not be considered by the jury."

In these rulings we hold there was error. In St. Louis, Jerseyville and Springfield R. R. Co. v. Kirby, 104 Ill. 345, we held that it is competent to show, in such cases, that the land proposed to be taken has a special value to the owner by reason of a special profitable use, and he is entitled to compensation for the loss occasioned by deprivation of such special use. In that case the use was that of a training track. It was said: "The value of land consists in its fitness for use, present or future, and before it can be taken for public use the owner must have just compensation. If he has adopted a peculiar mode of using that land, by which he derives profit, and he is deprived of that use, justice requires that he be compensated for the loss. That loss is the loss to himself. It is the value which he has, and of which he is deprived, which must be made good by compensation." And upon like principle we held in Lake Shore and Michigan Southern Ry. Co. et al. v. Chicago and Western Indiana R. R. Co., 100 Ill. 21, that where land has no market value, from the fact of its being used as a right of way for a railroad, and devoted to a special use of making railroad transfers, estimates of its value with reference to such use, by those competent to speak in that regard, should be received on the question of compensation to be paid for its condemnation for the use of another railroad company for its right of way. And in Lafayette, Bloomington and Mississippi R. R. Co. v. Winslow et al., 66 Ill. 219, it was said: "As land and city lots have no standard value, it is right and

necessary to take the opinions of witnesses, and to hear the facts upon which such opinions are founded."

The principle recognized in these cases clearly leads to this: If property has a special value, from whatever cause, that special value belongs to the owner of the property, and he is entitled to be paid it by the party seeking condemnation. In determining the value of real property in such cases, to the owner, witnesses may give their opinions, and any special circumstances upon which those opinions are founded, for what they are worth.

For the errors indicated, the judgment is reversed and the cause remanded.

Judgment reversed.

FIRST NAT. BANK OF CHICAGO v. BAKER.

161 Ill. 281.

(1896.)

CARTWRIGHT, J. Appellee is receiver of the Corey Car & Manufacturing Company, appointed by the Circuit Court of Cook county in pursuance of a bill filed by Henry S. Jaffray against that corporation. Apellant filed its petition in the suit, alleging an indebtedness of the defendant corporation to it, evidenced by promissory notes, and secured by a chattel mortgage executed by the defendant prior to the commencement of the suit. The prayer of the petition was that the receiver should be ordered to pay the indebtedness secured by the mortgage, or to deliver up the mortgaged property to be dealt with in accordance with the terms of the mortgage, or that the receiver should be ordered to sell the property, and, from the proceeds of the sale, pay the petitioner the amount of its mortgage. The petition was answered by the receiver. It was also answered by Lesh, Sanders & Egbert Company and S. D. Kimbark, who were creditors of the receiver, denying the right of the petitioner, and claiming an estoppel against the enforcement of the mortgage. Upon a hearing, the prayer of the petition was

denied, and it was dismissed at the cost of the petitioner. That decree has been affirmed by the Appellate Court.

A certificate of evidence appears in the record, but it does not purport to contain all the evidence introduced on the hearing of the petition. Where a decree is entered granting relief, the rule is that the decree must be justified either by facts which it specifically finds, or by evidence appearing in the record. White v. Morrison, 11 Ill. 361; Bennett v. Whitman, 22 Ill. 448; James v. Bushnell, 28 Ill. 158; McIntosh v. Saunders, 68 Ill. 128; Marvin v. Collins, 98 Ill. 510. But a decree dismissing a bill or petition needs no evidence to support it. It is supported by the absence of any evidence, since that is the proper decree in case there is no evidence, or if the evidence is insufficient to authorize the relief asked for. Ryan v. Sanford, 133 Ill. 291, 24 N. E. 428; Jackson v. Sackett, 146 Ill. 646, 35 N. E. 234; Alexander v. Alexander, 45 Ill. App. 211. The decree dismissing the petition in this case cannot be reversed because the relief was denied, unless appellant shall show that the evidence was such as to entitle it to the relief asked for. In order to do this, the whole of the evidence must be preserved; otherwise it will be presumed that there was evidence which justified the finding. Corpus v. Teed, 69 Ill. 205; Allen v. LeMoyne, 102 Ill. 25; Groenendyke v. Coffeen, 109 Ill. 325; Brown v. Miner, 128 Ill. 148, 21 N. E. 223.

The fact that the solicitors for appellee indorsed the certificate "O. K.," over their signatures, is insisted upon as ground for the claim that the certificate must be considered as containing all the evidence. This, however, does not follow. The indorsement was an acknowledgment of the correctness of the certificate for what it purports to be, but the approval of the certificate could not be extended beyond what appeared in it.

It is also argued that it appears elsewhere in the record that the certificate of evidence contained a complete statement. This claim is founded on the fact of the recital in the decree that two witnesses

therein named were examined in open court. But this recital does not show that all the evidence, even of those witnesses, is contained in the certificate; and it appears, both from the certificate and the decree, that there was other evidence than the testimony of these witnesses introduced, and considered by the court. There is nothing in the record which will aid the certificate, and the rule that cases shall not be reversed on a partial statement of the evidence is of too great importance to be disregarded.

One of the findings of the decree was that the mortgage was not acknowledged by the defendant corporation according to law; and, the acknowledgment appearing upon the face of the mortgage, and being unaffected by any question of evidence, it is argued that this court should determine, as a matter of law, whether the acknowledgment was valid. Whatever the conclusion might be as to that question, or however erroneous the finding, as a matter of law, might be held, the appellant would not be aided, because the court further finds in the decree, as a matter of fact, that the petitioner is equitably estopped from enforcing the mortgage against the lawful creditors of the receiver. The fact is found upon the evidence, and, if correct, the decree must be sustained, whether the acknowledgment was legal or not. As the record does not purport to contain all the evidence upon which the decree denying the relief was founded, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

BATES v. SKIDMORE.

170 Ill. 233.

(1897.)

Magruder, J. The only question which we deem it necessary to consider in this case is whether or not the Circuit Court erred in overruling the motion made by the complainant below (the appellant here) to dismiss the bill without prejudice at her own cost. It is

assigned for error that the Circuit Court erred in denying and overruling said motion. We are unable to see why said motion should not have been allowed. It is true that when the motion to dismiss was made, on January 12, 1897, the cause had theretofore, to-wit, on December 16, 1896, been referred to a master; but no proof had been introduced, nor had any other steps of any kind been taken before the master, when the motion was made on January 12, 1897. This court has decided that a complainant may dismiss his or her bill at any time before decree, when no cross-bill has been filed. Reilly v. Reilly, 139 Ill. 180, 28 N. E. 960; Langlois v. Matthiessen, 155 Ill. 230, N. E. 496. It is not denied by appellee that, if this had been a mere motion to dismiss the bill, appellant would have been entitled to have it allowed. But it is said that this was a motion, not merely to dismiss the bill, but to dismiss it without prejudice. It is then contended that it is within the discretion of the trial court to grant a motion to dismiss a bill in chancery without prejudice, or to deny it; that the court was not bound to exercise its discretion in favor of a dismissal of the bill without prejudice unless some good reason was given why it should be dismissed; and that in the present case, as no such good reason was given, and as there was no abuse of its discretion by the court, the refusal to dismiss cannot be here insisted upon as error. In Reilly v. Reilly, *supra,* it was said that there were some cases which hold that a chancellor has a discretion, and may, in certain cases, likely to work a hardship to a defendant, refuse to allow a complainant to dismiss his bill; but it was also there said that such cases were not in harmony with the current of authority, and that we were not inclined to change the rule already adopted by this court, in order to follow such cases. In Langlois v. Matthiessen, *supra,* we sustained the action of the Circuit Court in dismissing a bill without prejudice upon motion of the complainant, although the cause had been heard upon the evidence as reported to the court by the master. In the case last mentioned we said: "In the case at

bar there had not, so far as the record discloses, been any determination of the rights of either party, and there is nothing in the record to show that there was any abuse of discretion by the trial court in permitting the bill to be dismissed without prejudice." It might naturally be inferred from this language that the right to dismiss without prejudice is a matter of discretion with the court, but it was not there intended to lay down any such general rule. Where a bill is dismssed without any consideration of the merits, and before decree, even though the order of dismissal does not contain the words "without prejudice," the judgment or decree of dismissal is not *res judicata,* and constitutes no bar to a new proceeding for the same cause of action between the same parties. Such termination of the suit leaves the parties as if no legal proceedings had been taken. 6 Enc. Pl. & Prac., pp. 986, 987; Richards v. Railway Co., 124 Ill. 516, 16 N. E. 909; Chamberlain v. Sutherland, 4 Ill. App. 494. The same is true where the order is that the bill be dismissed "without prejudice." In other words, the dismissal of a bill by a complainant upon his own motion before the merits are considered, and the dismissal of such a bill by the complainant upon his own motion without prejudice, have the same effect, to the extent that neither is a bar to a new proceeding for the same cause of action between the same parties. In Ray v. Adden, 50 N. H. 84, which was a bill for divorce filed by a husband against his wife, and where an entry was made that the suit was "dismissed without prejudice," those words were held to indicate that the bill was not dismissed upon the merits of the case, or because the equities were shown to be with the defendant. In Kempton v. Burgess, 136 Mass. 192, it was said: "It is a matter of course to permit a plaintiff to dismiss his bill at any time before hearing, upon payment of the costs. * * * Such an order of dismissal is in the nature of a nonsuit at law, and not a bar to another bill. * * * When a bill is dismissed upon the motion of the plaintiff, it is a safe and convenient practice, and we think it is our usual practice,

to dismiss it without prejudice." This authority certainly holds that a dismissal of a bill by a complainant at his own costs at any time before hearing is the same as a dismissal of it "without prejudice." In Vaneman v. Fairbrother, 7 Blackf. 541, where a complainant in chancery moved the court to dismiss the bill "without prejudice," and the court refused so to dismiss the bill, but dismissed it "with prejudice," it was held that the dismissal would be no bar to another suit for the same cause; and it was there said, in the opinion deciding the case: "Had the order of dismission contained the words 'without prejudice,' as desired by the complainant, it would have afforded no more security to its rights than it would without them; and the insertion of the words 'with prejudice,' as insisted on by the court, does not render the order of dismission peremptory, like a decree of dismission on the merits. Either set of words is unmeaning in an order of dismissal on the motion of the complainant without a final hearing, as it would have been had the cause been dismissed on motion of the defendants for want of prosecution." 1 Beach, Mod. Eq. Prac., §§ 450, 463.

Under the view thus presented, it would appear that a complainant would have the same right to dismiss his bill without prejudice at his own cost before a hearing, as to dismiss it at his own cost before a hearing, without stating in the order that it was so dismissed without prejudice. If this rule is to prevail, it certainly was error in the court below not to grant the complainant's motion to dismiss her bill without prejudice, under the circumstances. But it is true that some authorities hold that the propriety of permitting a complainant to dismiss his bill without prejudice rests in the sound discretion of the court. Adams, Eq., p. 375, note 2; Conner v. Drake, 1 Ohio St. 170; Chicago & A. R. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 3 Sup. Ct. 594. But, where it is a matter of the discretion of the court, such discretion must be a sound, legal discretion, and must be exercised with reference to the rights of both parties. Beach, in the first volume of his work on Modern Equity Practice,

at § 450, says: "It is very clear, from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of the costs, is of course, except in certain cases." One of the exceptions is that a court may refuse permission to dismiss a bill without prejudice if such a dismissal would work a prejudice to the other party. It is not regarded as prejudice to the defendant that the complainant dismisses his own bill, simply because the complainant may file another bill for the same matter. Another exception is that such order of dismissal should not be made where the defendant has been put to the trouble of making his defense. 1 Beach, Mod. Eq. Prac., § 450; Bank v. Rose, 1 Rich. Eq. 294; Chicago & A. R. R. v. Union Rolling-Mill Co., *supra*. In the case at bar we are unable to discover that, if appellant's motion to dismiss had been granted at the time it was made, the appellee would have been prejudiced in any other way than that she might be liable at some future time to become defendant to another bill of the same character. At the time when appellant's motion was made, appellee had not been put to any trouble in making her defense; nor, at that time, had it been made manifest that she was entitled to a decree in her favor. Therefore, even if the rule is to prevail that the granting or refusing of a complainant's motion to dismiss the bill at his or her own cost before a hearing is within the sound discretion of the court, we discover no reason upon the face of this record why such discretion should not have been exercised in favor of appellant's motion. The costs in this case accruing up to the time of making the motion to dismiss, and including such motion, should be paid by the appellant, but all costs incurred subsequently to the refusal of the court to grant such motion should be paid by the appellee. With this direction as to the division and payment of the costs, the decree of the Circuit Court is reversed, and the cause is remanded to that court, with directions to dismiss appellant's bill without prejudice.

Reversed and remanded.

CRAWFORD v. BELL,

95 Ill. App. 427.

(1900.)

Mr. Justice Sears delivered the opinion of the court.

This is an appeal from an interlocutory order granting an injunction. By the order appellant and others were restrained from the prosecution of some hundred attachment suits brought by appellant against the various appellees. The original bill of complaint was filed by Asa Bell, who was made a defendant in one of the attachment suits, and the other appellees, who were severally defendants in other attachment suits brought by appellant, filed their intervening petitions in the cause. The relief asked by the original bill of complaint and by each intervening petition was the same, viz., that the further prosecution of the attachment suits be enjoined. Neither the bill of complaint nor any of the intervening petitions was verified. No affidavits were presented in support of the motion for a temporary injunction. The order granting the injunction recites that "the court having heard the testimony of the defendants and other witnesses taken in open court, etc., and being fully advised in the premises does order," etc. But the order does not recite any facts found from such testimony.

The order cannot be sustained. It is not necessary to consider any other ground of objection except the lack of any evidence to support the unverified allegations of the bill of complaint. This bill of complaint was not sworn to by any one, and was not even signed by the complainant, but by his solicitor only. No affidavits were filed in support of the bill, and the evidence heard by the chancellor is not preserved by a certificate of the evidence or by specific findings of fact in the decree. The order can not be permitted to thus rest upon the mere unverified allegations of a bill of complaint. It has been repeatedly held by this court that to warrant the issuing of a temporary in-

junction upon the allegations of a bill of complaint, these allegations must, in their material parts, be verified, and that such verifications must be positive and not merely upon information and belief. The Board of Trade v. Riordan, 94 Ill. App. 298, and cases therein cited.

Here there was no verification whatever. The recital in the order that evidence was heard by the chancellor in open court, does not avail, for that evidence is not preserved. It is a well established rule of our chancery practice, that an order or decree granting affirmative relief must have support in the record, either by finding of specific facts in the decree, or by depositions, or by evidence contained in the report of a master in chancery or by certificate of the evidence. White v. Morrison, 11 Ill. 361; Ward v. Owens, 12 Ill. 283; Nichols v. Thornton, 16 Ill. 113; Bennett v. Whitman, 22 Ill. 448; James v. Bushnell, 28 Ill. 158; Waugh v. Robbins, 33 Ill. 181; Quigley v. Roberts, 44 Ill. 503; Wilhite v. Pearce, 47 Ill. 413; Driscoll v. Tannock, 76 Ill. 154; Marvin v. Collins, 98 Ill. 510; Baird v. Powers, 131 Ill. 66; Bonnell v. Lewis, 3 Ill. App. 283; Updike v. Parker, 11 Ill. App. 356; Gage v. Eggleston, 26 Ill. App. 601; Rump v. Rump, 94 Ill. App. 582.

At common law it rests upon the party attacking the judgment to preserve the evidence, if he desires to question its sufficiency; but in chancery it rests upon the party in whose favor the decision grants relief to preserve in some manner, in the decree itself or elsewhere in the record, the evidence which sustains and warrants the decree. Hughs v. Washington, 65 Ill. 245.

And this rule of practice applies as well to other orders in a suit in chancery as to the final decree. Albright v. Smith, 68 Ill. 181; Stinnett v. Wilson, 19 Ill. App. 38.

In no manner is the evidence preserved in this record to support the order appealed from. It must therefore be reversed. The order is reversed and the cause is remanded.

TITUS v. MABEE,

25 Ill. 232.

(1851.)

Mr. Justice Walker delivered the opinion of the court.

This was a bill filed, by the trustees of the bondholders of the St. Louis, Alton and Chicago Railroad, against Mabee, Pitts and Brown,—the first two, judgment creditors of the road, and the last the sheriff of Madison county. The object of the bill was to enjoin the sheriff from selling a freight car, an iron safe and an iron planing machine, to satisfy executions which had been issued on their judgments. On the sixth day of April, 1857, the railroad, with its lands, track, furniture, equipments and personal property, was conveyed to complainants in trust, to secure bondholders of the road in their debts and accruing interest. The bill alleges that the property levied upon, under the executions, is the same that was held by the road, and embraced in the deed of trust, or has been subsequently acquired, and is essential to the prosperity of the road. The court below dissolved the injunction, from which decision the complainants appeal to this court.

It is first urged that the decree of the court below is not final, and is therefore not the subject of review in this court. The only relief sought by the bill, was to enjoin the sale of the property under the executions, and when defendants entered their motion to dissolve the temporary injunction, it was for the want of equity appearing on the face of the bill. The motion operated precisely as a demurrer, and by it the defendant admitted the truth of all the allegations relied upon to entitle the complainants to an injunction. The practice is to allow either a demurrer to the bill, or a motion to dissolve the injunction, and either course produces precisely the same result, so far as the injunction is concerned. On sustaining the demurrer, or allowing the motion, the temporary injunction is in either case dis-

solved, and if no other relief is sought, the case is virtually at an end. If the bill were retained, and full proof of all the allegations which it contained was made, the result would not be changed. It would only be to prove what is admitted by the demurrer or the motion. If other relief were sought by the bill, the decree dissolving the injunction could not, however, be regarded as final. But as no other relief was sought in this case, we are of the opinion that without reference to what has become of the bill, the decree of the court is final, and this court has jurisdiction to review that decision.

BARTON v. BARBOUR,

104 U. S. 126.

(1881.)

Mr. Justice Woods delivered the opinion of the court.

This was a suit brought by Frances H. Barton, the plaintiff in error, against John S. Barbour, as receiver of the Washington City, Virginia Midland, and Great Southern Railroad Company.

The declaration was as follows: "The plaintiff, Frances H. Barton, sues the defendant, John S. Barbour, as receiver of the Washington City, Virginia Midland, and Great Southern Railroad Company, a corporation organized under a law of the State of Virginia, and doing business and having an office in the District of Columbia, for that the defendant, on the eleventh day of January, 1877, was running and operating a railroad through the State of Virginia, and upon said railroad the defendant was a common carrier of freight and passengers for hire. That, on the day and year aforesaid, the plaintiff was a passenger in a sleeping-car upon said railroad, and by reason of a defective and insufficient rail upon the track of said railroad the car in which the plaintiff was a passenger was thrown from the track and turned over down an embankment, and she was greatly hurt and injured,

and her bodily health permanently injured; that the defendant did not use due care in relation to said defective rail, and the injury to the plaintiff was occasioned by the negligence and carelessness of the defendant, but the plaintiff used due care. The plaintiff claims $5,000 damages."

To this declaration the defendant below filed a plea to the jurisdiction, in which he alleged that at the time of service of process on him he was the receiver of all the property, rights, and franchises of said railroad company, by virtue of a decree made by the Circuit Court for the city of Alexandria, in the State of Virginia, on July 13, 1876, in a cause depending on the equity side of said court, wherein John C. Graham, who sued for himself and others, was complainant, and said railroad company and others were defendants; that said decree authorized him to defend all actions brought against him as such receiver, by the leave of said court, and declared that he should not in any case incur any personal or individual liability in conducting the business of said railroad, by reason of any act done by him or his servants, he acting in good faith and in the exercise of his best discretion, but that the property in his hands as such receiver should nevertheless be chargeable with any claim which might be established in any action brought against him as such receiver under leave of the court first had and obtained.

The plea then averred that the plaintiff had not obtained leave of said court to bring and maintain said suit. Wherefore the defendant prayed judgment whether the court could or would take further cognizance of said action.

The plaintiff filed the general demurrer to the plea.

The court below gave judgment overruling the demurrer, and against the plaintiff for costs. She prosecutes this writ of error to reverse that judgment.

The question presented by the record is the sufficiency of the plea to the jurisdiction of the court.

The defendant insists that the Supreme Court of the District of Columbia had no jurisdiction to enter-

tain the suit without leave of the court by which he was appointed receiver.

It is a general rule that before suit is brought against a receiver leave of the court by which he was appointed must be obtained. Davis v. Gray, 16 Wall. 203, and cases there cited. But the learned counsel of the plaintiff in error strenuously contends that the only consequence resulting from prosecuting the suit without such leave is that the plaintiff may be restrained by injunction or attached for contempt, and that the rule applies only to cases where the suit is brought to take from the receiver property whereof he is in possession by order of the court. We conceive that the rule is not so limited.

The evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such. Hall v. Smith, 2 Bing. 156; Camp v. Barney, 4 Hun (N. Y.) 373; Commonwealth v. Runk, 26 Pa. St. 235; Thompson v. Scott, 4 Dill 508.

If he has the right, in a distinct suit, to prosecute his demand to judgment without leave of the court appointing the receiver, he would have the right to enforce satisfaction of it. By virtue of his judgment he could, unless restrained by injunction, seize upon the property of the trust or attach its credits. If his judgment were recovered outside the territorial jurisdiction of the court by which the receiver was appointed, he could do this, and the court which appointed the receiver and was administering the trust assets would be impotent to restrain him. The effect upon the property of the trust, of any attempt to enforce satisfaction of his judgment, would be precisely the same as if his suit had been brought for the purpose of taking property from the possession of the receiver. A suit therefore, brought without leave to recover judgment against a receiver for a money demand,

is virtually a suit the purpose of which is, and effect which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.

And it has been so held in effect by this court. In Wiswall v. Sampson (14 How. 52), this court said: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the court, and the sale, therefore, in such a case should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court to abide the result of the litigation, and to be applied to the payment of the judgment creditor who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise the whole fund may have passed out of its hands before the final decree, and the litigation become fruitless."

So in Ames v. Trustees of Birkenhead Docks (20 Beav. 332), Lord Romilly, Master of the Rolls, said that it is an idle distinction that the rule forbidding any interference with property in the course of administration in the Court of Chancery, only applies to property actually in the hands of the receiver, and declared that it applied to debts, rents, and tolls, which the receiver was appointed to receive.

It is next asserted by the plaintiff that the fact that the receiver in this case is in possession of, and is con-

ducting the business of, a railroad as a common carrier, takes his case out of the rule that he is only answerable to the court by which he is appointed, and cannot be sued without its leave. Her contention is that parties who deal with such a receiver, either as freighters or passengers upon his railroad, may for any injury suffered, either in person or property, sue him without leave of the court by which he was appointed.

We do not perceive how the fact that the receiver, under the orders of the court, is doing the business usually done by a common carrier makes his case any exception to the rule under consideration. It was said by this court in Cowdrey v. Galveston, etc., Railroad Co. (93 U. S. 352), that "the allowance for goods lost in transportation, and for damages done to property whilst the road was in the hands of the receiver, was properly made. The earnings received were as much chargeable with such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind, as well as the expenses incurred in their behalf, were paid." This puts claims against the receiver, in his capacity as a common carrier, on the same footing precisely as the salaries of his subordinates, or as claims for labor and material used in carrying on the business. If a passenger on the railroad, who is injured in person or property by the negligence of the servants of the receiver, can, without leave, sue him to recover his damages, then every conductor, engineer, brakeman, or track-hand can also sue for his wages without leave. To admit such a practice would be to allow the charges and expenses of the administration of a trust property in the hands of a court of equity to be controlled by other courts, at the instance of impatient suitors, without regard to the equities of other claimants and to permit the trust property to be wasted in the costs of unnecessary litigation.

Such is not the course and practice of courts of equity in administering a trust estate. The costs and

expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver, or any other fact upon which his liability depends, or in regard to the amount of the damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts.

The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way.

We, therefore, think that the demand of the plaintiff is not of such a nature that it may be prosecuted by suit without leave of the court.

The plaintiff lastly contends that want of leave to bring the suit does not take away the jurisdiction of the court in which it was brought to hear and determine it, but only subjects the plaintiff to liability to be attached for contempt, or to be enjoined from its further prosecution. In other words, she says that leave to prosecute the suit is not a jurisdictional fact, and that, therefore, the plea to the jurisdiction should not have been sustained.

Our decision upon this question will be limited to the facts of this case, which are that the receiver was appointed by a court of the State of Virginia, and the property in course of administration was in that state; the suit was brought in a court of the District of Columbia, a foreign jurisdiction, and the cause of action was an injury received by plaintiff in the State of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed. No leave was obtained to bring the suit, and it does not appear that any application was made, either to

the receiver or to the court by which he was appointed, to allow and pay the demand of the plaintiff.

Upon these facts we are of opinion that the Supreme Court of the District of Columbia had no jurisdiction to entertain a suit.

This point has been substantially settled by this court in the case of Peale v. Phipps, 14 How. 386.

In that case it appeared that, under a law of the State of Mississippi, by the decree of the Circuit Court of Adams County in that state, the charter of the Agricultural Bank at Natchez was declared forfeited and the corporation dissolved, and Peale, the plaintiff in error, appointed trustee and assignee of its assets, and was the sole legal representative of the corporation; that he became legally liable to the creditors of the bank to the extent of the assets, and that he had assets in his possession sufficient to pay all the debts of the corporation. The defendants in error claimed that there was due them from the bank a large sum of money on account of mesne profits, etc., of certain real estate in Natchez, from which they had been unlawfully expelled by the bank, and the possession of which they had recovered from the bank in an action of ejectment. The defendants in error presented their claim to Peale, the receiver, for allowance as a valid claim against the bank, who refused to admit or allow it, or any part of it.

Thereupon the defendant in error brought suit against Peale in the United States Circuit Court for the Eastern District of Louisiana, to recover said mesne profits, and effected service upon him in that district. Peale, among other defenses, filed an exception, in which he denied the jurisdiction of the court. This was overruled and judgment was rendered against him for $20,058, to be satisfied out of the assets of the bank in the hands of Peals as trustee. The case having been brought on error to this court, the judgment was reversed. The court, Mr. Chief Justice Taney delivering its opinion, said: "As we think this exception," the one just mentioned, "decisive against the jurisdiction of the Circuit Court of

Louisiana, it is unnecessary to set out the other exceptions. We see no ground upon which the jurisdiction of the court can be sustained. The plaintiff in error held the assets of the bank as the agent and receiver of the court of Adams county and subject to its order, and was not authorized to dispose of any assets or pay any debts due from the bank, except by order of the court. He had given bond for the performance of his duty, and would be liable to an action if he paid any claim without the authority of the court from which he received his appointment and to which he was accountable. The property in legal contemplation was in the custody of the court of which he was an officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it and wrest it from the hands of its agent and thereby put it out of his power to perform his duty.'' And the court declared that the facts stated in the petition showed ''that the Circuit Court of Louisiana had no jurisdiction'' of the case.

That case differs from the one now under consideration only in this, that it was a suit to recover a judgment against the trustee and receiver upon a demand due from the bank before his appointment; while the present case seeks to establish a demand against the receiver for a claim which, according to the decision of this court (Cowdrey v. Galveston, etc., Railroad Co., *supra*), forms a part of the charges and expenses of executing that trust. Such charges are specially subject to the control and allowance of the court which is administering the trust property.

We think, therefore, that the case just cited is decisive of this.

The argument is much pressed, that by leaving all question relating to the liability of receivers in the hands of the court appointing them, persons having claims against the insolvent corporation, or the receiver, will be deprived of a trial by jury. This, it is said, is depriving a party of a constitutional right.

To support this view the following cases are cited: Palys v. Jewett, New Jersey Court of Error and Appeals, Am. Law Reg., Sept., 1880, 553; Kinney v. Crocker, 18 Wis. 74; Allen v. Central Railroad of Iowa, 42 Iowa 683.

But those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that a case belongs to this class, the trial of question involved in it belongs to the court itself, no matter what may be its importance or complexity.

Thus, upon a bill filed for an injunction to restrain the infringement of letters-patent, and for an account of profits for past infringement, it is now the constant practice of courts of equity to try without a jury issues of fact relating to the title of the patentee, involving questions of the novelty, utility, prior public use, abandonment, and assignment of the invention patented. The jurisdiction of a court of equity to try such issues according to its own course of practice is too well settled to be shaken. Rubber Company v. Goodyear, 9 Wall. 788; Cawood Patent, 94 U. S. 695; Marsh v. Seymour, 97 id. 348.

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankrupt is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion. True, if one claims that the assignee has wrongfully taken possession of his property as property of the bankrupt, he is entitled to sue him in his private capacity as a wrong-doer in an action at law for its recovery.

Very analogous to the case of an assignee in bankruptcy is that of a receiver of an insolvent railroad company or other corporation. Claims against the company must be presented in due course, as the court having charge of the case may direct. But if, by mistake or wrongfully, the receiver takes possession of property belonging to another, such person may bring suit therefor against him personally as a matter of right; for in such case the receiver would be acting *ultra vires*. Parker v. Browning, 8 Paige (N. Y.) 388; Paige v. Smith, 99 Mass. 395; Hills v. Parker, 111 id. 508. So far the case seems plain. But if claims arise against the receiver as such, whilst acting under the powers conferred on him, whether for labor performed, for supplies and materials furnished, or for injury to persons or property, then a question of some difficulty arises as to the proper mode of obtaining satisfaction and redress. The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control over its property by the courts charged with the settlement of its affairs and the disposition of its assets. Two very different courses of proceeding are presented for adoption. One is the old method, usually applied to banking, insurance, and manufacturing companies, of shutting down and stopping by injunction all operations and proceedings, taking possession of the property in the condition it is found at the instant of stoppage, and selling it for what it will bring at auction. The other is to give the receiver power to continue the ordinary operations of the corporation, to run trains of cars, to keep the tracks, bridges, and other property in repair, so as to save them from destruction, and as soon as the interest of all parties having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claim.

It is evident that the first method would often be highly injurious, and result in a total sacrifice of the

property. Besides, the cessation of business for a day would be a public injury. A railroad is authorized to be constructed more for the public good to be subserved, than for private gain. As a highway for public transportation it is a matter of public concern, and its construction and management belong primarily to the Commonwealth, and are only put into private hands to subserve the public convenience and economy. But the public retains rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchises. And in most cases the creditors cannot complain, because their interest as well as that of the public is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchise from forfeiture for non-user.

As a choice, then, of least evil, if not of the most positive good (but generally of the latter also), it has come to be settled law that a court of equity may, and in most cases ought to, authorize its receiver of railroad property to keep it in repair, and to manage and use it in the ordinary way until it can be sold to the best advantage of all interested. The power of the court to do this was expressly recognized in Wallace v. Loomis, 97 U. S. 146.

But here arises a dilemma. If the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities.

It has, therefore, been found necessary, and has become a common practice for a court of equity, in its decree appointing a receiver of a railroad property, to provide that he shall not be liable to suit unless leave is first obtained of the court by which he was appointed.

If the court below had entertained jurisdiction of this suit, it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession, and to enforce the payment of such charges and expenses out of the trust property without the leave of the court which was administering it, and without consideration of the rights and equities of other claimants thereto. It would have been an usurpation of the powers and duties which belonged exclusively to another court, and it would have made impossible of performance the duty of that court to distribute the trust assets to creditors equitably and according to their respective priorities.

We therefore declare it as our opinion that when the court of one state has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty by carrying on the business to which the property is adapted, until such time as it can be sold with due regard to the rights of all persons interested therein, a court of another state has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed and in which the property in his possession is situated, based on his negligence or that of his servants in the performance of their duty in respect of such property.

Judgment affirmed.

WANGELIN v. GOE,

50 Ill. 459.

(1869.)

Mr. Chief Justice Breese delivered the opinion of the court.

The important question raised on this record is, as to the power of a circuit judge to grant an injunction on the facts stated in the bill of complaint, and that brings up the question of the refusal of the court to dissolve the injunction on motion, and the ruling of the court in disallowing a demurrer to the bill.

Appellants make the point, first, that the motion to dissolve should have been allowed, as the material allegations of the bill were disproved by the affidavits submitted by the defendants in support of the motion.

We are not advised of any practice in our courts to submit affidavits on a motion to dissolve an injunction, and do not understand by what proceeding the affidavits to which reference is made have become a part of the record in this case. The motion to dissolve the injunction operates in the same way as a demurrer to the bill, and is based on matters intrinsic, appearing on the face of the bill, hence no affidavits showing extraneous matter could be used. Titus v. Mabee, 25 Ill. 257.

When an answer is filed denying the allegations of the bill, it would then be in order to move for a dissolution of the injunction, as provided in chap. 72, entitled "Ne exeat and injunctions," sec. 13 of which provides that upon filing an answer it shall be in order at any time to move for the dissolution of an injunction, and upon such motion, it is allowed to either party to introduce testimony to support the bill and answer, and this is substantially the English practice. This motion is to be decided by the court upon the weight of testimony, without being bound to take the answer as absolutely true. Gross' Stat. 458.

The motion to dissolve, and the production of affi-

davits, were, therefore, premature, and the court did right to disallow it.

The next point made is, that the demurrer to the bill should have been sustained, and the bill dismissed for want of equity on its face.

The office of a demurrer to a bill in equity is to deny, in form and substance, the complainant's right to have his case considered in a court of equity, and to admit all the allegations that are properly pleaded, and when it is disclosed on the face of the bill that a court of equity has no jurisdiction, because the party has an adequate remedy at law, the bill is obnoxious to a demurrer for want of equity, and it will be so adjudged on error or appeal. Winkler v. Winkler et al. 40 Ill. 179.

To determine if the demurrer was well taken, we must look at the facts stated in the bill of complaint.

The most important are, briefly, these: That complainant Goe is a resident of St. Clair county, and on the ninth day of November, 1868, one Henry C. Yaeger was in the lawful possession of certain real estate in the town of Lebanon, in that county, containing two acres and four rods of ground, "being the tract of land known as the Wangelin Mill tract;" that Yaeger sold the same to complainant for $14,000, with the appurtenances, in fee simple, and put complainant in possession; that while so in possession he made valuable and lasting improvements on the premises and put the mill in good running order, and was running the mill, and had in it wheat and corn belonging to himself and his customers, to be ground into flour and meal, of the value of $1,000, and that he was operating the mill with great profit to himself, his customers, and to the community generally; that, being thus in possession, on the twenty-fifth day of January, 1869, about twelve o'clock noon of that day, while he was absent at dinner, the defendants, Wangelin and Heuer, combining with others unknown, against the will of complainant, and with force and arms, broke and entered into possession of the premises and with drawn pistols drove the miller from the premises, and have

ever since, with a guard of armed men, with force, kept possession of the mill by day and by night, and deprived complainant of the use of the mill, thereby depriving him of large gains and profits; that thereby he has suffered irreparable injury and damages for which he has no adequate remedy at law, and he charges that neither of the defendants has property subject to execution at law. The prayer is, that the defendants, and all persons under them, be enjoined from interfering with complainant in the possession and operation of the mill, and that, on the final hearing, the injunction may be made perpetual, and for other relief.

It is apparent the sole object of the bill was for an injunction to restrain defendants from doing what the bill alleges they had done, and if it was to have any effect whatever, it must be made to operate as a writ of restitution, a writ which the court could not grant, under the allegations and prayer of the bill. The deed was done, and there remained nothing on which the writ of injunction could operate. An injunction is understood to be a preventive remedy merely, and cannot be so framed as to command a party to undo what he has done. The very terms of the writ indicate its purpose, that is, restraint. It is described as a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ, the most common sort of which operate as a restraint upon the party in the exercise of his real or supposed rights, and is called the remedial writ of injunction. The other sort, requiring a party to do a particular thing, is sometimes called the judicial writ, and only issues after a decree has passed, and is in the nature of an execution to enforce it. 2 Story's Eq. Jur., sec. 861.

It is further said, in the same treatise, that the object of this process is generally protective and preventive, rather than restorative, though, by no means confined to the former.

It is under this last branch of the definition appellee relies, to sustain this proceeding. His counsel say, the only point properly presented by the record is, whether

a court of chancery will restrain, by injunction, an insolvent person, who, by brute force, with weapons, is molesting a party in the peaceable and lawful possession of his property, until the rights of the parties can be settled at law.

It is unfortunate for the appellee, that his bill of complaint contains no allegation that proceedings at law have been, or are about to be, instituted, to try the respective rights of these parties to the premises, nor is there any allusion whatever to any such proceedings. It is a naked bill for an injunction to restrain appellants from doing the acts which the bill alleges they have done. There is no prayer that appellants shall be turned out of possession and appellee put in. The facts stated disclose nothing more than a simple case of trespass, by a forcible entry and detainer, the remedy for which is ample at law, and fully adequate. It has often been held by this court, that a party can have no footing in a court of equity when he has an adequate remedy at law. Winkler v. Winkler et. al., *supra.*

The point made by appellee is disposed of by saying that, in a proper case, a court of chancery will restrain, by injunction, any person who, by brute force, with weapons, is molesting a party in the peaceable and lawful possession of his property, provided the rules of law, in their application to the case, shall afford him no adequate remedy. But that is not the case. There is no charge in the bill that appellants are molesting appellee in the enjoyment of his property. The acts charged are past and done, and the prayer is that they be restrained from doing them. As well might A, whose dwelling house has been entered by a trespasser during the temporary absence of the family, apply for an injunction to restrain him from doing such an unlawful act. We think the books will be searched in vain for a precedent of that character. It is urged by appellee, where a trespass is like to be repeated, and the party is insolvent, or adequate damages cannot be estimated in money, an injunction is proper, and in this connection says that injunctions

to prevent forcible dispositions of possession were common at one time in England, referring to 2 Story's Eq. Jur., secs. 869-70. By turning to sec. 869, it will be seen that the author is treating of cases wholly different from this. He says, "in the early course of chancery proceedings, injunctions to quiet the possession of the parties before the hearing were indiscriminately granted to either party, plaintiff or defendant, in cases where corporeal hereditaments were the subject of the suit, the object of them being to prevent a forcible change of possession by either party, pending the litigation." In the next section, 870, the author says, "the practice of granting injunctions of this sort has become obsolete in England, if not altogether, at least in so great a degree that there are few instances of it in modern times. But injunctions in the nature of an interdict, *unde vi,* of the Roman law, to restore a possession from which the party has been forcibly ejected, are, under the name of possessory bills, said to be still common in Ireland."

The proceeding before us is of this character, and is in the nature of an interdict *unde vi,* but there is no precedent for it in the American or English courts, and, we may add, no necessity for it. Again, counsel for appellee say that courts of equity interfere in cases of trespass, to prevent irreparable mischiefs, or to suppress multiplicity of suits and oppressive litigation, in cases of cutting timber, digging in mines, coal beds, quarries, and the like. That is all true, and the restraining power of chancery is often successfully invoked in such cases, but no case can be shown where the trespasser was required to put back into the quarry or mine, or coal bed, the material he had taken out.

The counsel further say that mill operators are protected from molestation in their business, for the same reason that miners are protected, because it is impossible to estimate their losses and profits, and irreparable injury is done to the operator and to the public, and Hilliard on Injunctions, 448, is referred to. The author is there treating of the rights of mill owners on the same stream of water, and the power of a

court of chancery to enjoin a nuisance,—cases quite different from the one we are considering.

Reference is also made by appellee to a case decided by this court, in support of the injunction. It is the case of Brunnenmeyer et al. v. Buhre et al., 32 Ill. 183. That was a case in which a difficulty had arisen in a religious society of which Brunnenmeyer was one of the trustees, and Buhre the pastor. This trustee, with one of his co-trustees, Fickensher, locked up the church building, to the exclusion of the pastor and those members of the church who desired to retain him in that position. There was, subsequently, an election of trustees, by a majority of the members, and the pastor was retained in their service.

The church being locked up by Brunnenmeyer, the pastor, Buhre, with other members of the church, and on behalf of the church, exhibited their bill in chancery, against Brunnenmeyer and others, for an injunction, setting out their title to the church property, and praying for an injunction to restrain the defendants from interfering or in anywise intermeddling with the complainants and members of the church in convening and worshipping according to its usages and customs, as they had theretofore done.

The defendants admitted the charge of locking up the church to protect the property in it, alleging it was done upon proper authority, setting out the facts. The court, on final hearing, made the injunction perpetual, and on appeal to this court the decree was affirmed, the court holding the church was trust property, and that the defendants were not warranted in closing it against the complainants, thereby depriving them of the use of it for purposes of worship. It was urged in that case that the act complained of was already performed, and there was nothing to restrain, but the court said it was not like a simple act of trespass—it was of a continuing nature, and designed to deprive complainants of their rights in the future as well as in the past, and to prevent this continuing injury and deprivation of right, the court had the authority to interpose by its restraining power, and to grant preventive relief, to

the same extent that it could to prevent a single injurious act.

It is apparent in this case that the rules of law furnished no adequate remedy for the injury of which complaint was made, as no action of forcible entry and detainer would lie, while in the case at bar, one of the most simple remedies known to the law, and fully adequate, was open to the appellee.

The case of Goodnough v. Sheppard, 28 Ill. 81, cited by appellee, was a case of the ordinary exercise of the powers of the equity court to restrain an officer from disturbing a man in possession, who was not a party to the judgment or named in the execution, and who did not claim through any of the litigating parties. The ground of that decision is that a person in the quiet possession of real estate as owner, may have an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party, a case of very frequent occurrence.

The case of Webber v. Gage, 39 N. H. 182, is referred to, as sustaining this injunction. That was a case where the complainant had enjoyed an easement to his saw mill for forty years, and the defendants were restrained from obstructing it or closing it up.

Among the numerous cases cited by appellee we do not find one where an injunction was awarded after the act was done, or to put a party in possession of real estate on a bill to restrain *tort-feasors* from entering upon the estate. If, on a bill for such purpose, it should be found the wrong-doers are in actual possession, they would not be held as in contempt in maintaining such possession by force. The case of The People v. Simonson, 10 Mich. 335, is on this point. The proceedings were for a contempt. The complainant, Van Ness, was put in actual possession of certain premises under a lease from Wapler, who had obtained a writ of possession against Simonson. On the same day he was put in possession, he was put out with all his effects by Simonson. The injunction was served a few days after, and the next day Van Ness undertook to enter the house, but was prevented by

Simonson, who, with the other respondents, continued to keep him out. It was for this the attachment issued against the respondents, Simonson and others, to answer for a contempt in disobeying the injunction.

The court say, when the bill was filed, and ever since, Simonson and the other respondents under him have had the actual possession of the premises, and their acts, during this period, have consisted only in endeavor to maintain it. This being the case, the court say the injunction has not been violated, for it was issued to preserve an actual possesion against molestation, and not to oust a possessor who may have been a tortious holder. No court can, by a preliminary *ex parte* order or process, turn even a wrong-doer out of possession, and we cannot presume that the writ in the case before us was designed to have any such operation.

In these views we fully accord, and as it is a case in many respects identical with the one before us, we must hold, as in that case, that as the injunction was allowed in this case, the wrong-doers being in possession of the premises when the bill was filed, they could not be turned out of possession by such a writ.

Even in cases of nuisance, equity will not exercise jurisdiction to remove it, until it is found to be such by a jury, either in an action at law or on an issue out of chancery, and with an erection which, if made, might be a nuisance, a court of equity would not interfere, but would leave the injured party to his action on the case. Dunning v. The City of Aurora, 40 Ill. 481.

This bill is brought, evidently, to recover possession of the mill, and is what may be called an ejectment bill, and such a bill is demurrable, the redress being at law, either by action of ejectment, trespass *quare clausum fregit,* or by the more summary mode, by the action for forcible entry and detainer. Story's Eq. Pl., sec. 476.

A case similar, in some respects, to this, as the bill alleged and unlawful and violent entry into the premises, withholding their use from the complainants, and depriving them of their support and maintenance from

the land, and that the defendant was insolvent, and praying that the defendant be enjoined and compelled to surrender the premises, and that a receiver be appointed, is reported in 14 Maryland, 376, Pfeltz et al. v. Pfeltz et al. There it was held the facts charged in the bill did not show defendant was committing irreparable damage to the property, to prevent which an injunction was necessary. That court considered the object of the proceeding was to obtain possession of the land, and presented a case proper for redress at law, and reversed the judgment of the Circuit Court granting an injunction.

The only material difference between that case and this is that complainaint in his bill charges that by the forcible entry and taking possession of the mill he has been deprived of the use of the mill, and of large gains and profits therefrom, whereby he has suffered irreparable injury and damages for which he has no adequate remedy at law.

No damage to the premises is alleged, nor is there any statement in the bill from which such an inference can be drawn, and it is usually for such irreparable damages an injunction can be allowed, and then only for purposes of prevention. The injunction is a preventive remedy. It comes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively, so as to remove it. Att'y Gen. v. New J. R. R. & Trans. Co., 2 Green's Ch. R. 136.

We may add to this, that it is at the same time a fetter and a shield, not a weapon to pierce.

The record in this case further shows that the appellants, refusing to surrender possession of the mill, on the service of the writ of injunction, an attachment for the contempt was issued against them, returnable before the judge at chambers, which coming to the knowledge of the defendants, they surrendered the possession to the sheriff, and no further proceedings were had on the attachment.

Under these circumstances, and as the injunction

was wrongfully sued out, and as, by it, or through the instrumentality of proceedings under it, the defendants have been deprived of the possession of the mill, and which, for aught we know, may be their rightful property, we deem it but just that a writ of restitution should issue to restore to them the possession of the premises. In the ordinary action of ejectment, when, upon the recovery by the plaintiff, a writ of possession issue in his favor, upon a new trial and recovery by the defendant, a writ of restitution issues in his behalf, so in this case, appellants having been deprived of the possession by the action of the Circuit Court, and which we have considered as unauthorized, it is but just and equitable they should be restored to the position they occupied at the time these proceedings were commenced, and complainant remitted to his action of ejectment, or forcible entry and detainer, to recover the possession. He must be the actor in such a proceeding, and not appellants.

Upon the point made by appellants, that the court proceeded to a decree on overruling the demurrer, there was no irregularity in that, as the record shows the defendants elected to abide by the demurrer, and if they had not so elected, it was not necessary the court should have ruled them to answer, but could proceed at once to a decree. Roach v. Chapin, 27 Ill. 194. The error is in the decree itself, having been rendered on a bill void of equity.

The decree must be reversed and the cause remanded, with directions to the Circuit Court to award to appellants a writ of restitution of the premises in the bill described, if the same should be moved for by them.

Decree reversed.

ST. LOUIS, A. & S. R. CO. ET AL. v. HAMILTON.

158 Ill. 366.

(1895.)

Craig, C. J. The first question presented by the record is whether the court erred in overruling the demurrer of Joseph Dickson, receiver, to the declaration. It will be observed that Joseph Dickson was sued, not as an individual, but as a receiver. It was thus impliedly admitted in the declaration that Joseph Dickson had been appointed receiver of St. Louis, Alton & Springfield Railroad Company by some court in competent jurisdiction; and, having been thus appointed, he was an officer of the court, and his possession of the land sought to be recovered was the possession of the court. The law is well settled, where a receiver has been appointed by a court of competent jurisdiction, and has taken possession of property in his capacity of receiver, he has the right to hold such property, and dispose of it under the direction of the court; and any unauthorized interference therewith, by taking possession of the property, or instituting legal proceedings to obtain possession, without the sanction of the court appointing such receiver, is a direct contempt of court, and punishable as such. Richards v. People, 81 Ill. 554. Here the property was in the possession of Dickson as receiver, and, if the plaintiff desired to contest his right to hold the possession of the property, the law required her to go to the court who appointed the receiver, and obtain permission to bring an action for that purpose. Beach, Rec. §§ 655, 726; Hight, Rec. §§ 254, 395a, 139. In the last section this author says: "Thus, the court will not permit a claimant of real estate which is in possession of its receiver to bring an action of ejectment without first obtaining leave for that purpose. And ordinarly, when real estate is in the actual possession of a receiver, an action of ejectment will not be maintained

against him in another court, but the claimant will be permitted to pursue his remedy against the receiver in the action in which he was appointed." In section 254, the author says: "And it is necessary to aver in the * * * declaration against a receiver that leave of court has been granted to bring the action, and the absence of such averment is fatal on demurrer." See, also, Keen v. Breckinridge, 96 Ind. 69. The question of right to bring an action against a receiver without first obtaining leave arose in Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702; and, after a review of the authorities, it was held: While it was a contempt of court to bring suit against a receiver without leave of court, and while the appointing court may protect its officer by attachment, or by an injunction stopping the suit, the failure to obtain such leave is no bar to the jurisdiction of the court in which the suit is brought, in all cases where there is no contempt to interfere with the actual possession of the property held by the receiver. Here the action was brought for the purpose of obtaining possession of the property held by the receiver, and, under the rule announced, we think the plaintiff should have averred in her declaration that she had obtained leave of the court in which the receiver was appointed to bring the action, and the court erred in overruling the demurrer to the declaration.

There is another ground upon which the judgment must be reversed: As has been seen, the defendant, by the second plea, presented an issue as to its possession of the land when the action was brought. Under this issue it devolved on plaintiff to prove that the defendant was in the possession of the premises, but no evidence whatever was introduced to establish that fact; and, as plaintiff was not entitled to judgment against defendant unless it was in possession, the court erred in rendering the judgment against the defendant the St. Louis, Alton & Springfield Railroad Company. For the errors indicated the judgment will be reversed, and the cause remanded.

Reversed and remanded.

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